Tagore Law Lectures—1881.

THE LAW OF TRUSTS

IN

BRITISH INDIA.

WITH AN

APPENDIX,

CONTAINING

THE REGISTRATION OF SOCIETIES ACT (XXI OF 1860), RELIGIOUS ENDOWMENTS ACT (XX OF 1863), OFFICIAL TRUSTEES ACT (XVII OF 1864), INDIAN TRUSTEE ACT (XXVII OF 1866), THE TRUSTEES' AND MORTGAGEES' POWERS ACT (XXVIII OF 1866), THE RELIGIOUS SOCIETIES ACT (I OF 1880), AND THE INDIAN TRUSTS ACT (II OF 1882).

BENGAL SECRETARIAT LIBRARY.

By WILLIAM FISCHER AGNEW,

OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW, AUTHOR OF "A TREATISE ON THE LAW OF PATENTS" AND "A TREATISE ON THE STATUTE OF FRAUDS."

CALCUTTA:

THACKER, SPINK AND CO.,

Publishers to the Calcutta University.

BOMBAY: THACKER AND CO., LIMITED. MADRAS: HIGGINBOTHAM AND CO.

LONDON: W. THACKER AND CO.

1882.

BENGAL SECRETARIAT LIBRARY

TABLE OF CONTENTS.

LECTURE I.

ORIGIN OF TRUSTS IN ENGLAND.

Page

Origin of Trusts in England — Tenures — Feudal system — Sub-infeudation — Estates of freehold — Alienation of estates — Gifts to religious houses — Mortmain — Uses — Statute of Uses — Object of Statute — Legal and equitable estates — Trusts among Hindus — Krishnaramini Dasi's case — Tagore case — Trusts for creditors — Family religious trusts — Legislation in India — Arrangement of subject — Definition of trust — Must be confidence — Merger — Definition of terms — Kinds of trust — Simple trust — Special trust — Ministerial and discretionary trust — Mixture of trust and power — Lawful and unlawful trusts — Public and private trusts — Executed and executory trusts — Austen *v.* Taylor — Jervoise *v.* The Duke of Northumberland — Coape *v.* Arnold — Executory trusts in marriage articles and wills — Distinction between them — Marriage articles — Blackburn *v.* Stables — Jervoise *v.* Duke of Northumberland — Will — *Cy près* — Intention — General rules — Subject-matter of trust — Trusts against policy of law — Title of honor — Trusts of immoveable property without the jurisdiction of a Court — Penn *v.* Baltimore — Act X of 1877, ss. 15, 16 — High Courts' Charter — Letters Patent — Suits for land — Foundation of Jurisdiction — Court of Equity acts *in personam* and not *in rem* — Land may be in a foreign country — Angus *v.* Angus — Lord Cranstown *v.* Johnston — Privity — Foundation of jurisdiction — Injunction restraining proceeding by other Courts — Trusts of moveable property abroad — Object must be lawful — General rule for ascertaining whether trust lawful — Indian Contract Act, s. 23 — Trusts contrary to policy of law or founded upon illegal contract void — Assignment of half pay — Trusts for future illegitimate children — Trust for illegitimate children in being, or *en ventre sa mère* — Trust forbidden by law — Trusts postponing enjoyment of property or restraining alienation — Accumulation — Perpetuities among Hindus — Restraint on alienation — Condition restraining alienation after absolute gift — Insolvency — Trust to cease on bankruptcy or insolvency — Trust to cease on happening of particular event — Clauses of forfeiture construed strictly — Trust for immoral purposes — Failure of trust — Illegal purpose failing — Must be a *cestui que trust* — Trust partly lawful and partly unlawful — Trust of immoveable property in foreign country . . . . . .

LECTURE II.

Declaration of Trust.

Page

Declaration of trust — Intention to create trust must be shown — Valuable consideration — Consideration not necessary — Transmutation of possession — Voluntary settlements — If incomplete, not enforced against settlor — If nothing more to be done by settlor, trust is complete — Assignment by *cestui que trust* — Notice — What amounts to a valid declaration of trust — Ineffectual assignment — *Chose-in-action* — Subsequent disclaimer by trustee — Settlor cannot revoke voluntarily — Setting aside voluntary settlement — Defrauding creditors — To what property Statute applicable — Question of fraud is one of fact — Assignment by way of mortgage — Valuable consideration not support when *mala fides* — Sale to defeat Crown — Assignment in favour of one creditor — Voluntary settlements within Statute — Indebtedness of settlor — Secured debts — Consideration paid to third person — Voluntary settlement only void as against existing creditors — Unless fraud — How far settlement void — Insolvent Act, s. 9 — Section 24 — Defrauding purchaser — Statute does not extend to personal estate — When settlor may defeat settlement — Subsequent purchase must be for value — How far voluntary settlement defeated — Personalty settled — Subsequent will — Conveyances with power of revocation — Effect of Statute — Valuable consideration — Marriage — Extrinsic evidence admissible to show consideration — Settlement not set aside as against grantors — Voluntary settlement in expectation of death — Rectifying settlement — Enforcement — On whom binding — Creditors' deeds how far revocable — Johns *v.* James — Execution of deed by creditors — Deed not communicated to creditors — Trust by will for payment of debts . . 11

LECTURE III.

Implied and Resulting Trusts.

Implied trusts — Precatory trusts — Objects, property, and trust must be described — Words of recommendation and entreaty — Intention to give absolutely — Intermediate class of cases — Maintenance — Agreement to settle property — Vendor trustee for vendee — Resulting trusts — Undisposed of interest — Excluding heirs — Parol evidence to rebut presumption — Illegal purpose — Trust to sell — Trusts vague — No trust declared — Trust declared of part only of estate — Transfer of stock or money into name of another — Purchase in name of trustees — Purchase in name of stranger — Expression of wish — Delay — Rule applies to joint purchase — To personal as well as real estate — Purchase in fictitious name — Parol evidence admissible on part of person paying purchase-money — Parol evidence on behalf of person to whom conveyance made — To rebut presumption as to part of the property — Statute of Frauds — Conveyance to stranger without consideration — Purchases in the name of a wife or child no resulting trust — Reputed wife — Person *in loco parentis* — Purchase by a mother — Purchase in name of nephew — Fiduciary relationship — Purchases void as against creditors — Rules apply to personal estate — Surrounding circumstances

Page

to be considered — Purchase-money unpaid — Joint tenancy when created — Purchase in the name of a child and a stranger — Evidence to rebut presumption of advancement — Subsequent acts and declarations — Possession by father — Dividends received by father — Devise, bequest, or Rase — Child fully advanced 77

LECTURE IV.

BENAMI TRANSACTIONS AND CONSTRUCTIVE TRUSTS.

Benami transactions — Purchase in name of child — Burden of proof — Strangers—Benami transactions among Mahomedans — Assent of benamidar unnecessary — Disputing landlord's title — Suit by landlord against beneficial lessees — Strict proof required — Oral evidence — Proof of payment of purchase-money — Pleading benami transaction against purchaser under s. 317, Civil Procedure Code — Purchase at sale for arrears of revenue — Sale by benamidar — Standing by — Purchaser with notice — Real owner may sue benamidar — Equitable owner — Suit by creditors against benamidar — Transaction avowedly fraudulent — Constructive trusts — Renewal of leases by trustee — Principle of rule — Instances — Remedy — Agent of trustee — Legal adviser gaining advantage by ignorance — Gifts to persons in fiduciary capacity — Voluntary gift where no fiduciary relation exists — Where it does not — Spiritual influence — Parent and child — Persons *in loco parentis* — Guardian and ward — Gift to legal adviser — Extent of rule — Gift in expectation of death — Strangers — Principles on which Court acts — Badges of fraud — Independent advice — At whose instance set — Acquiescence — Confirmation and acquiescence — Laches . . 97

LECTURE V.

PARTIES TO THE TRUST.

Acceptance of trust — Trustees also executors — Acting as agent — Executor of an executor — Renunciation of probate — Partial acceptance — Recitals in deed as to state of trust — Trustee in fact — Liability of trustee — By whom trust may be created — General rule — The Sovereign — Corporations — Prizes of war — Infants — Married women — Stridhan — Alien — Persons convicted of certain offences — Grantee under sanad — Who may be a *cestui que trust* — The Government — Corporations — Aliens — Who may be a trustee—Persons under disability — Aliens — The Sovereign — Not the Government of India — Corporation — Presidency banks — Marrried women — Insolvent — *Cestuis que trustent* — Relatives — Number of trustees — Disclaimer — How made — Gift to trustee or executor 120

LECTURE VI.

DUTIES AND LIABILITIES OF TRUSTEES.

Duties and liabilities of trustee—Trustee to acquaint himself with state of property — Trustee bound to protect trust-property — Getting in trust-estate — Estate outstanding on personal security — When securities to be realized — Care required from trustee — Loss occasioned by agent —

Page

By act of co-trustee — Trust-fund consisting of money — Control of trust-fund — Failure of banker — Trustee to prevent waste — Permissive waste — *Cestui que trust* may not benefit by waste — Tenant-for-life without impeachment of waste — When Court may interfere — Principle on which Court acts — Waste by Hindu widow — Suit for possession — Receiver — Alienation by widow — Proper parties to sue — Collusion by immediate reversioner — Conversion of perishable property — Howe *v.* Earl of Dartmouth — Pickering *v.* Pickering — Exceptions from rule — Trustee to be impartial — Discretion of trustees not interfered with — Selecting objects of the trust — Modes of investment — Exercise of power by will — Trustee cannot set up title to trust-property — Claim by third person — Delivery up of moveable property — Failure of *cestui que trust* — Trustee to keep accounts — Vouchers — Costs — Good faith — Managing member of Hindu family — Duties of trustee as to investment — Personal security — Shares in companies — Where personal security allowed — One *cestui que trust* not to be benefited at expense of others — Consent of *cestuis que trustent* to change — Continuing investment — Varying securities — Investment or mortgage — Trustees may not lend to themselves — Paying over mortgage-money — Consent of Court to investment — Trustees' and Mortgagees' Powers Acts — Official Trustee's Act of 1864, s. 14 — Remedy in case of non-investment — Remedy in case of wrongful investment — Insolvency of trustee — Duties of trustees for sale or mortgage — Trustee bound to sell to best advantage — Must attend to interest of all parties — Valuation — Absolute trust for sale will not authorize mortgage — Trust to mortgage will not authorize sale — Trust for sale survives — Trustees bound to make good title — Counsel's opinion — Payment of purchase-money — Duties of trustees for purchase 185

LECTURE VII.

Duties and Liabilities of Trustees.

Time within which sale of trust-property to be made — Discretion to be exercised — Conveyance of trust-property to *cestuis que trustent* — Distribution of the trust-fund — Derivative title — Payment after death of *cestui que trust* — Appointment of trustee to assist in distributing — Presumption of death — Rebuttal of presumption — Release — Liability for payment to wrong persons — Costs — Interest — Bond of indemnity — Authority from *cestui que trust* to receive the money — Payment on written authority — Payment to persons under disability — Partners — Payment to single trustee — Overpayment — Refund to executor — Payment when debt from testator subsisting — Liability of trustee for breach of trust — Trustee liable though he has not benefited — Extent of liability — Trustee about to abscond — Criminal breach of trust — Liability of professional adviser — Partner — Loss by accident — Neglect to obey directions in instrument of trust — To pay premiums — Sale to purchaser for valuable consideration without notice — Agent — Barnes *v.* Addy - Limitation — Wilful default — Concurrence — Fraud by trustees — By *cestui que trust* — Acquiescence — Delay — Release and confirmation — No set-off in respect of breach of trust —

Page

Liability for breach of trust by predecessor or co-trustees — Trustee joining in receipt for conformity — Trustees giving receipt bound to see to investment — Walker *v.* Symonds — Trustee joining in act for convenience — Executor joining in receipt for conformity — Executor must ascertain that money required — Executor not liable as such for act of co-executor — Styles *v.* Guy — Liability under decree for common account — Unnecessarily handing over assets — Restraining intended breach of trust — Several liability of co-trustees — Limitation of liability — Contribution — Impounding fund in Court — Costs — Trustee paying under power-of-attorney — Payment without notice of transfer — Indemnity-clause 172

LECTURE VIII.

Rights and Powers of Trustees.

Custody of title-deeds — Right of trustee to reimbursement — Costs — Expenses of management — Accounts — Advances by trustee — Wrongful act of agent — Repairs — Lien for expenses — Agents have no lien — Interest on advances — Advances in respect of different trusts — Personal liability of *cestui que trust* to reimburse — Indemnity — Suit to recover advances — Public funds — Indemnity from gainer by breach of trust — Suit to administer trusts — Appeal — Costs — Application to Court for opinion in management of trust-property — Right to settlement of accounts — General authority of trustee — Advice of *cestui que trust* — What acts trustee may do — Repairs — Winding up estate — Maintenance — Compounding or releasing debts — How trust-property may be sold — Conditions of sale — Buying in — Power to convey — Power to vary investment — Power to apply property for maintenance — Minors' Act — Liability of purchaser to see to application of purchase-money — Fines and Recoveries Act — Trustees' and Mortgagees' Powers Act — To whom purchase-money payable — Charge of debts — Notice of breach of trust — Suspension of trustee's powers after decree ... 211

LECTURE IX.

Disabilities of Trustees.

Trustee cannot renounce after acceptance — Trustee cannot delegate — Employment of solicitor to invest — Delegation to co-trustee or co-executor — Necessary delegation — Co-executor — Delegation authorized by author of trust — Representatives of surviving trustee — Fraud by co-trustee — Discretionary trust — Ministerial acts — Liability of agent — Co-trustees cannot act singly — All trustees must join in receipt and conveyance — Proof in insolvency — Exception to rule in case of public trust — Special power — Acknowledgment — Costs of acting independently — Injunction — Remuneration for trouble — Carrying on business — Surviving partner trustee — Solicitor trustee — Extent of charge allowed — Costs — Trustee appointed by Court — Professional charges not allowed — Settled account — Remuneration fixed by author of trust — Contract for remuneration with *cestuis que trustent* — Gift coupled with duty — Expenses of agent — Curators under Act XIX of 1841 and Act XL of 1858 — Official Trustee — Administrator-General

Page

— Trustee may not make a profit from his office — Employing trust-funds in trade — Compounding debts or mortgages and purchasing — Purchase for benefit of *cestui que trust* — *Cestui que trust* cannot give to trustee — Rule applies to all fiduciary relations — Partners — Purchasing share of deceased partner — Instances of rule — Trustee retiring for a consideration — Extent of liability — Failure of heirs of *cestui que trust* — Failure of next-of-kin — Trustee for sale cannot purchase — Trustee purchasing from himself — That price fair immaterial — So nature of property, or mode of purchase — Trustee who has never acted — When *cestui que trust* may set aside sale — Trustee may not buy for another — Agent of trustee may not purchase — Trustee taking lease — Time within which sale must be set aside — Confirmation — Purchase from *cestui que trust* — Fiduciary relation dissolved — Burden of proof — Purchase by creditors — Assignee — Leave to bid — Purchase from infants — Legal representatives — Mortgagee — Lending to trustees 234

LECTURE X.

Of the Rights and Liabilities of the *Cestui que Trust*.

Right of *cestui que trust* to rents and profits — Tidd *v.* Lister — Right to call for conveyance — Costs — Indemnity — Right of *cestui que trust* to have trust carried out — Right of *cestui que trust* to hold property absolutely — Separate use — Right of *cestui que trust* to inspection — Custody of title-deeds — Right of *cestui que trust* to alienate his interest — Cautions in assignments of equitable interest — Separate use — Method of conveyance — Assignee takes subject to all equities — Set-off — Mutual demands must be in respect of same rights — Notice to trustees — Mortgage — Description of property — What is sufficient notice — To whom notice to be given — Agents — Notice to one of several trustees — Notice before trust-fund received — Bankers — Trustee purchaser — Nonpayment — Mortgagee — Immoveable property — Stop-order — Right to execution of trust — Suit for execution of trust — Intention of author of trust carried out — Right to proper trustees — Suit for appointment of new trustees — Costs — Grounds for removal of trustee — Rules for selecting new trustees — *In re* Tempest — Right to compel trustee to do act of duty — Injunction — Wrongful purchase by trustee — Interest — Allowance for outlay — Reconveyance — Interest — Costs — Following trust-estate into hands of third persons — Volunteers — Purchasers for value — Purchase from guardian — Notice of trust — Purchaser for valuable consideration without notice — Purchaser without notice from purchaser with notice — Purchaser with notice from purchaser without — Fraud — Doubtful equity — Following converted trust-property — Proof of purchase with trust-money — Money, notes, or negotiable instruments — Trust-fund mixed with trustee's money — Pennell *v.* Deffell — *Re* Hallett's Estate — Lien — Limitation — Accrual of cause of action — Fraud — Purchase from manager of joint Hindu family — Position of shebait — Duty of purchaser — Terms on which sale set aside — Duty of manager — What is sufficient necessity — Sale to pay debts — Hunooman Persaud

Page

Panday's case — Purchaser under execution — Purchase from heir of Mahomedan debtor — Acquisition by trustee of trust-property wrongfully converted — Liability of executor or administrator to pay interest — Liability of trustee who leaves property uninvested — When trustee liable to pay interest — Trustee employing trust-funds in trade — Docker *v.* Somes — Apportioning profits — Compound interest — Trust-funds mixed with trustee's money — Partner trustee employing trust-funds in business — Election where trust-property to be sold or invested — Election by one *cestui que trust* to retain property unconverted — Notification of election — Liability of *cestui que trust* joining in breach of trust — Against whom interest of *cestui que trust* applied — Rights and liabilities of transferree from *cestui que trust* . . 266

LECTURE XI.

Vacating the Office of Trustee.

Vacating the office of trustee — Discharge by *cestuis que trustent* — Discharge under power in instrument — Number of trustees — Trustee dying in lifetime of settlor — Payment into Court — Refusing or declining — Retiring — Last survivor — *Cestui que trust* may be appointed — Assignee or devisee of trustee becoming unfit or incapable — New trustee should be within jurisdiction — Trustee paid to retire — Breach of trust — Appointment must be completed — Stamp — Discharge by Court — Grounds of discharge — Whether retiring trustee must appoint successor — Must be by suit — Affidavits of fitness — Official Trustee's Act, s. 10 — Appointment where property lost — Costs — Grounds for discharge — Discharge of representatives of trustee — Executor — Trustees' and Mortgagees' Powers Act, s. 34 — Conveyance to new trustee — Survival of trust — Extinction of trust — Compulsory payment into Court — Nature of interest of plaintiff — Payment in of share — Payment after decrees — Payment in of fund not received — Admission of receipt of money by trustee — Appointment of receiver — Necessary parties to a suit — Suits by or against strangers — Civil Procedure Code — Succession Act, s. 187 — Suits for specific performance — Representative specially constituted — Suits between trustees and *cestuis que trustent* — Representatives of deceased trustee — When trustee unnecessary party — *Cestui que trust* abroad — Suit for aliquot share — Suit between trustees — Executors and administrators — Suit by one *cestui que trust* on behalf of others — When allowable — Severing defence — Costs of severing — Costs — In suits between stranger as parties to trust — Between trustees and *cestuis que trustent* — Costs out of fund — Costs, charges, and expenses — Disclaimer — Costs after decree — Suit necessary by act of trustee — Accounts — Law doubtful 326

LECTURE XII.

Religious and Charitable Trusts.

Religious and charitable trusts — Trust of immoveable property — Bequests to religious or charitable uses — What are charitable purposes — Religious purposes — Inhabitants of particular place — Improvement of particular place — Trust for particular classes or persons — Educational

Page

purposes — Gift must be for the public — Must be certain — Morice *v.* Bishop of Durham — Instances of uncertainty — Principles of construing will — *Cy près* — Altering scheme — Gift for charitable purposes generally — Particular purpose failing, where gift is to charity generally — Particular charity not described — Failure of object where no intention to give to charity generally — Apportionment of fund — Gift over — Charity in foreign country — Breach of trust — Mode of procedure to obtain redress — Civil Procedure Code, s. 539 — Liability of trustees to account — New trustee — New trustees of society for maintaining religious worship — Memorandum of appointment — Vesting — Appointment of Official Trustee to charitable trust — Vesting property in trustees of charity — Visitors — Controlling revenues of charity — Subsequent gift — Purchaser without notice from purchaser with notice — Alienation of charity-estate — Religious trusts among Hindus — Perpetuities — Colourable gift to idol — Gift must be certain — Gifts to religious or charitable uses by Oudh taluqdars — Tenure in trustee — Trust imperfect — Devise subject to trust — Sale of property subject to trust — Partition subject to trust — Alienation — Evidence of endowment to be given — How far sale set aside — Trustee may not benefit by sale — Sale of turn of worship — Succession to trusteeship — Enjoyment of endowed property — Turn of worship — Limitation — Management vested in different persons — Proof of succession where manager bound to celibacy — Reversion — Removal of trustee — Removal of mohunt — Religious trust irrevocable — Execution of trust — Principles to be followed — Right to erect place of worship — Religious trusts among Mahomedans — Elements of *wuqf*, creation of — Evidence of appropriation — *Wuqf* to take effect after settlor's death — Requisites to valid *wuqf* — Undue influence — Endowment subject to mortgage — Revocation — Alienation of *wuqf* property — Nominal endowment — Alienation subject to trust — Mortgage by local custom — Lease of *wuqf* property — Transfer of trust — Purchaser from trustee — Breach of trust — Removal of trustee — Office of trustee — Female may be mutawalli — Succession to the office — Suits in respect of *wuqf* property 849

TABLE OF CASES CITED.

—oo—

A.

Page

Abas Alli Zenul Abaddin *v.* Gulam Muhammad Valad Baba Mirza 386
Abdul Ganne Kasam *v.* Hussen Miya Rahimtula 383
—— Rahman *v.* Yar Muhammed 390
Abhaya Chandra Roy Chowdhry *v.* Pyari Mohan Guho ... 158
Abraham *v.* Alman 80
Abul Hasan *v.* Haji Mohammad Masik Karbalai ... 384, 385
Acheson *v.* Fair 108
Ackroyd *v.* Smithson 86
Acland *v.* Gaisford 83
Acraman *v.* Corbett 61
Acton *v.* Woodgate 73, 75
Adair *v.* Shaw 292
Adames *v.* Hallett 60
Adams *v.* Claxton 140
—— *v.* Clifton 261
—— *v.* St. Leger 341
Adams' Trust, *Re* 284
Addison *v.* Cox 280
Adlington *v.* Cann 35
Administrator-General of Madras *v.* Hawkins 222
Adnam *v.* Cole 353
Adurmoni Deyi *v.* Chowdhry Sibnarain Kur 309
Advocate-General *v.* Fatima Sultani Begam 388, 389
—— *v.* Muhammad Hussen Husseni 390
—— *v.* Vishvanath Atmaram 364
Adye *v.* Feuilleteau 160
Aga Mahomed Kumul Tehranee *v.* Aga Abbas Tehranee ... 389
Aganoor *v.* Hogg 188
Agha Mahomed Ensoof Moosadee *v.* Abdool Hossein Khan ... 389
Agra Bank, *Ex parte* 278, 279
Agri Sharma Embrandri *v.* Vistna Embrandri 405
Ahmed Mahomed Patel *v.* Adjein Dooply 187
Airey *v.* Hall 58
Ajey Ram *v.* Girdharee 312
Alchin's Trust, *Re* 359
Aldridge *v.* Westbrook 333
Alexander *v.* Alexander 240
—— *v.* Mullins 344
—— *v.* The Duke of Wellington 125
Allen *v.* Bonnett 62
—— *v.* Jarvis 213
Aloksoondry Goopto *v.* Horolal Roy 106
Alton *v.* Harrison 52

Page
Alven v. Bond 260
Amand v. Bradbourne 213
Ames v. Parkinson 139, 162
Amphlett v. Parke 85
Ancona v. Waddell 47
Anderson, *Ex parte* 331
——— *In re* 331
——— v. Elsworth 117, 118
Andrew v. Trinity Hall 133
——— v. Wrigley 303
Andrews, *Ex parte* 251
——— v. Bousfield 280
——— v. Joakim 350
Angell v. Dawson 220
Angelo, *Re* 418
Angerstein, *Ex parte* 346
——— v. Martin 162, 221
Angier v. Stannard 178, 269
Angus v. Angus 29
Annersley v. Ashurst 232
Anon, 4 Ir. Eq. Rep. 284
——— 6 Madd., 10 283
——— 6 Madd., 11 169
——— 2 Russ., 350 264
——— 1 Salk., 155 252
——— 4 Sim., 359 338
——— 6 Ves., 632 261
——— 10 Ves., 103 244
——— 12 Ves., 5 340
Antrobus v. Smith 53, 55
Anund Moyee Chowdhrain v. Boykant Nath Roy 377
Apsey, *Ex parte* 319
Archer v. Hudson 112, 113
——— v. Preston 30
Ardglasse (Lord) v. Muschamp 30, 31
Ardill v. Savage 331
Armitage v. Coates 40
Armstrong v. Armstrong 82
Armstrong's Settlement, *Re* 434
Arnold v. Garner 243, 251, 255
Arnould v. Grinstead 162
Arruth Misser v. Juggernath Indraswamee 374
Arthur v. Clarkson 58
——— v. Midland Railway Co. 88
Arundel (Lady) v. Phipps 70
Ashburnham v. Thompson 313
Ashby v. Blackwell 179
——— v. Palmer 320, 321
Ashutosh Dutt v. Doorga Churn Chatterjee 373
Ashworth v. Hopper 35
Aston v. Wood 86, 357
Atterbury v. Wallis 280
Attorney-General v. Andrews 214

Page

Attorney-General v. Aspinall 223, 288, 350
——— v. Avon (Portreeve of) 344
——— v. Balliol College 344
——— v. Bance 362
——— v. Blizard 362
——— v. Brandreth 362
——— v. Brickdale 241
——— v. Brodie 380
——— v. Browne's Hospital 368
——— v. Bushby 354
——— v. Caius College 130, 285
——— v. Chesterfield (Earl of) 215
——— v. Clarendon (Earl of) 260
——— v. Clarke 353
——— v. Cock 353
——— v. Coopers' Co. 285
——— v. Cuming 346, 347
——— v. Daugars 347
——— v. Dedham School 33
——— v. Dixie 140, 367
——— v. Downing (Lady) 282, 283
——— v. Doyley 360
——— v. Dudley (Lord) 291
——— v. Eastlake 214
——— v. Exeter (Mayor of) 365
——— v. Fishmongers' Co. 350
——— v. Foundling Hospital 288, 367
——— v. Gaunt 367
——— v. Geary 221
——— v. Glegg 19, 240, 242
——— v. Glynn 359
——— v. Haberdashers' Co. 355
——— v. Hankey 359
——— v. Harrow School 242
——— v. Herrick 358
——— v. Higham 138, 161
——— v. Ironmongers' Co. 354, 358, 359
——— v. Kell 362
——— v. Lawes 353
——— v. Liverpool (Corporation of) ... 223, 288
——— v. London (City of) 347
——— v. Lonsdale (Earl of) 354
——— v. Magdalen College 368
——— v. Merchant 361
——— v. Margaret and Regius, Professors 354
——— v. Munro 156
——— v. Newark (Mayor of) 368
——— v. Norwich (Mayor of) 212
——— v. Painter-Stainers' Co. 354
——— v. Pearson ... 35, 215, 353, 362
——— v. Rance 358
——— v. Sands 32
——— v. Scott 240

Page

Attorney-General v. Sherborne School 362
——— v. Sidney Sussex College 357, 365
——— v. Solly 318
——— v. Stamford (Mayor of) 362
——— v. Stephens 282
——— v. Stepney 353
——— v. Stewart 351, 358
——— v. St. John's Hospital 358
——— v. Sturge 362
——— v. Tancred 354
——— v. Tyndall 353
——— v. Whorewood 130
——— v. Windsor (Dean of) 86
——— v. Wyville 346
Austen v. Taylor 20, 23
Aveling v. Knipe 87
Avery v. Griffin 131
Avison v. Holmes 47
Ayles v. Cox 438, 442
Ayliffe v. Murray 244, 248, 262
Aylwin v. Bray 192
Aylwin's Trusts, *In re* 45
Azim-un-Nissa Begum v. Dale 60, 64, 67

B.

Baber's Trust, *Re* 76
Back v. Andrews 90, 94
Backhouse v. Backhouse 282
Bacon v. Bacon 198, 205
Badcock, *Re* 421
Baddley v. Baddley 55
Bage, *Ex parte* 264
Bagnall v. Carlton 255
Bagram v. Moses 28
Bagshaw v. Spencer 20
Bailey v. Collett 457
——— v. Gould 138, 140
Bain v. Sadler 76
Bainbridge v. Burton 345
Bainbrigge v. Blair 247, 330, 340, 341
Baker v. Baker 260
——— v. Bradley 112, 117
——— v. Martin 247
——— v. Monk 112
Balchen v. Scott 236
Baldwin v. Bannister 251
Bale v. Coleman 23
——— v. Newton 68
Balfour v. Welland 231
Balkrishna Vasudev v. Madhavrav Narayan 109
Ball v. Burnford 69
——— v. Harris 170, 230
Balls v. Strutt 242, 287

Page
Balsh v. Hyam 214, 216
Bama Soonduree Dossee v. Bama Soonduree Dossee 148
Bamanji Manikji v. Naoroji Palanji 14, 73
Bank of Hindustan, China, and Japan v. Nundolall Sen ... 28
Bankes v. Le Despencer 24
Bapuji Auditram v. Umedbhai Hathesing 14
Bardswell v. Bardswell 79
Barker v. Peile 333
Barkley v. Reay (Lord) 340
Barling v. Bishopp 61, 64
Barnard v. Bagshaw 239
Barnes v. Addy 132, 185
——— v. Grant 78
——— v. Pinkney 281
Barnett v. Blake 47
——— v. Sheffield 324
Barrack v. M'Culloch 60, 68, 92
Barrett v. Hartley 244
Barrs v. Fewkes 86
Barry, *Ex parte* 278
——— v. Barry 145
——— v. Steel 331
Bartlett v. Bartlett 336
——— v. Pickersgill 87, 88, 89
Barwell v. Barwell 119, 252, 261
Basnett v. Moxon 433
Basoo Dhul v. Kisben Chunder Geer Gossain 374
Bate v. Hooper 149, 181, 348
——— v. Scales 167
Bateman v. Margerison 345
Bath v. Bradford (Earl of)... 168
Bathurst's Estate, *Re* 328
Batstone v. Salter 54, 86, 88, 92
Battersby's Trusts, *Re* 436, 438
Baugh v. Price 290
Baxter, *Re* 427, 438
Baycott, *Re* 435
Bayley v. Boulcott 58
Baylies v. Baylies 269
Baynard v. Woolley 180
Bayspoole v. Collins 69, 70
Beattie v. Johnstone 343
Beaumont v. Beaumont 340
——— v. Olivera 354
Beavan v. Oxford (Lord) 67
Bebee Jaun v. Meerza Mahomed Hadee 28
Beckford v. Beckford 91
——— v. Wade 303
Beecher v. Major 88
Bego Jan v. Luteefun 292
Belchier, *Ex parte* 222, 236
Belchior Francisco Ferras v. Roque Mariano Dos Angos ... 235
Bellasis v. Compton 89

Page
Bellasis's Trusts, *Re* 58, 82
Benbow *v.* Townsend 89
Bence *v.* Gilpin 132
Benn *v.* Dixon 149
Bennett, *Ex parte* 257, 259, 263, 289, 290, 291
——— *v.* Burgis 332
——— *v.* Wyndham 215
Benson *v.* Whittam 80
Bentley *v.* Craven 107, 253
——— *v.* Mackay 57, 72
Bergholt, *Re* 435
Berkhampstead Free School, *In re* 368
Bernard *v.* Minshull 78, 79, 80
Berry, *Ex parte* 70
——— *v.* Briant 81
Bessey *v.* Windham 65
Bethell *v.* Abraham 154, 161, 163, 171, 232
Beulah Park Estate, *Re* 216
Bheknarain Singh *v.* Januk Singh 309
Bhoobun Mohini Debia *v.* Hurrish Chunder Chowdhry ... 40
Bhowany Sunkur Pandey *v.* Purrum Bebee 105
Bibby *v.* Thompson 82
Bibee Kuneez Fatima *v.* Bibee Saheba Jan 381, 403
Bick *v.* Motley 201
Biddles *v.* Biddles 81
Biddulph *v.* Williams 86
Bifield *v.* Taylor 341
Bignold's Trusts, *Re* 435
Bika Singh *v.* Luchman Singh 314
Bill *v.* Cureton 65, 67, 71, 73
Billson *v.* Crofts 46
Bindasoondree Dassea *v.* Meheroonissa Khatoon 382
Bindley *v.* Mulloney 59
Bindoo Bassinee Dossee *v.* Boliechand Sett 146
Binks *v.* Micklethwait 217
Birch *v.* Wade 78, 283
Birch-Wolfe *v.* Birch 144
Bird, *In re* 236
——— *v.* Fox 231
——— *v.* Harris 86
——— *v.* Johnson 41
——— *v.* Maybury 81
Birkett, *In re* 354
Birks *v.* Micklethwait 348
Biron *v.* Mount 76
Bisambhur Naik *v.* Sudasheeb Mohapattur 308
Blackburn *v.* Edgeley 112
——— *v.* Stables 22, 24
Blackford *v.* Davis 212
Blackie *v.* Clark 115
Blad *v.* Bamfield 32
Blake *v.* Blake 96
——— *v.* Bunbury 269

Page
Blakeney v. Blakeney 82
Blanchard, *Re* 435, 438
Blenkinsopp v. Blenkinsopp 61
Blewett v. Millett 108
Bloye's Trust, *Re* 257, 260
Blundell's Trusts, *Re* 350
Bodenham v. Hoskyns 109
Bodh Singh Doodhooria v. Gunesh Chunder Sen 103
Bone v. Cook 209
——— v. Pollard 95
Bonfield v. Hassell 47, 54
Bonithorn v. Hockmore 212, 243
Bonney v. Ridgard 303
Bonser v. Kinnear 78
Booth v. Booth 120, 121, 189, 201, 203
——— v. Leycester 32
Boreham v. Bignold 178
Borrell v. Dann 223
Boss v. Godsall 161
Bostock v. Blakeney 167
——— v. Floyer 140, 179, 236
Bott v. Smith 61
Bottle v. Knocker 55
Boulton, *Ex parte* 277
Bourke, *Re* 438
Boursot v. Savage 293
Bousfield v. Hodges 225
Bovy v. Smith 313
Bowden v. Henderson 177
——— v. Laing 81
Bowes v. Strathmore (Earl of) 221
——— v. "City of Toronto" 255
Bowles v. Stewart 109
Bowra v. Wright 433
Brace v. Taylor 145
Brackenbury v. Brackenbury 19, 48
Brackenbury's Trusts, *Re* 435
Bradby v. Whitchurch 220
Brader v. Kerby 419
Bradford v. Belfield 240
Bradley v. Peixoto 41
Bradshaw, *Ex parte* 420, 426
Bradwell v. Catchpole 235
Brajnath Baisakh v. Motilal Baisakh 268
Brandon v. Aston 47
——— v. Robinson 41, 274
Brass's Trust, *Re* 427
Bray, *Ex parte* 212
——— v. West 133
Breareliffe v. Dorrington 282
Breechloading Co., *Re* 279
Breedon v. Breedon 231
Brice v. Stokes ... 183, 194, 195, 196, 198, 199, 201, 205

	Page
Bridge *v.* Bradon	281
——— *v.* Brown 212, 221,	227
Bridgeman *v.* Green 115, 117,	118
Bridger *v.* Rice	169
Bridgman *v.* Gill	344
Briggs *v.* Penny 78,	79
Bright *v.* North	214
Bright's Trusts, *Re* 278,	281
Brimho Mye Dibeea *v.* Ram Dolub Hor	105
Brindley *v.* Partridge	175
British Museum *v.* White	354
Broadbent *v.* Varley	278
Broadhurst *v.* Balguy 163, 189,	198
Brocksopp *v.* Barnes 244,	246
Brodie *v.* Barry	340
Brojo Kishoree Dassee *v.* Sreenath Bose	148
——— Mohun Doss *v.* Hurrololl Doss	364
——— Nath Ghose *v.* Koylash Chunder Banerjee	104
Bromley *v.* Holland	344
Brooke *v.* Haynes 121,	123
Brooker *v.* Brooker	188
Brookman *v.* Rothschild	107
Brophy *v.* Bellamy 153,	154
Broughton *v.* Broughton 244,	245
——— *v.* Mercer 28,	352
Brown *v.* Kennedy 72,	114
Browell *v.* Reed 171, 340,	341
Brown *v.* Carter	118
——— *v.* Casamajor 80,	82
——— *v.* De Tastet 244,	253
——— *v.* Higgs 78, 252,	283
Brown's Trust, *In re*	37
Browne *v.* Blount	344
——— *v.* Cavendish	73
——— *v.* Raban	449
——— *v.* Savage	281
Browne's Will, *Re*	272
Bruce *v* The Presbytery of Deer	357
Brudenell *v.* Elwes	38
Bruere *v.* Pemberton	167
Buchanan *v.* Hamilton	284
Buck *v.* Shippam	76
Buckeridge *v.* Glasse 120,	284
Buckhurst Peerage (The)	26
Buckland *v.* Papillon	449
Buckle *v.* Mitchell	67
Budree Lall *v.* Kantee Lall	311
Buggins *v.* Yates	79
Bulbeck *v.* Silvester	54
Bulkley *v.* Eglinton (Earl of)	435
——— *v.* Wilford	110
Buller *v.* Plunkett	280
Bullock *v.* Thorne	69

Page
Bullock *v.* Wheatley 138
Bulmer *v.* Hunter 61
Bunbury *v.* Bunbury 32
Bungseedhur Khettry, *Re* 66
Bunwaree Chaml Thakoor *v.* Mudden Mohun Chuttoraj ... 375
Burden *v.* Burden 244
Burdick *v.* Garrick 313, 318
Burge *v.* Brutton 245
Burgess *v.* Wheate 6, 33, 157, 251, 256, 273, 346
Burke *v.* Jones 76
Burn *v.* Carvalho 56
Burridge *v.* Row 323
Burrough *v.* Philcox 283
Burt, *Re* 442
Burton *v.* Wookey 107, 243
Burtoo Sing *v.* Ram Purmessur Singh 311
Bushnell *v.* Parsons 81
Bute (Marquis of), *Re* 422
Butler *v.* Butler 217
——— *v.* Prendergast 344
Buttanshaw *v.* Martin 271
Buxton *v* Buxton 172, 173
Byam *v.* Byam 242
Bykunt Nath Sen *v.* Goboollah Sikdar 107
Byne *v.* Blackburn 81
Byrchall *v.* Bradford 165

C.

Caflell *v.* Palmer 38
Cafe *v.* Bent 151
Caffrey *v.* Darby 137, 138, 184, 213
Caldwall *v.* Baylis 144
Calisher *v.* Forbes 280
Camden (Marquis of) *v.* Murray 153, 154
Camoys (Lord) *v.* Best 327, 329
Campbell, *Re* 419
——— *v.* Allgood 145
——— *v.* Home 217, 269, 271
——— *v.* Walker 169, 258, 259, 260, 264, 265, 289
Candler *v.* Tillett 138, 205
Caney *v.* Bond 138
Carew, *Re* 281
Carpenter *v.* Heriot 112, 261
Carr *v.* Ellison 320
——— *v.* Living 81
Carteret *v.* Petty 29
Cartwright *v.* Pettus 31
Cartwright's Trust, *Re* 438
Cary *v.* Cary 78
Castle *v.* Castle 81
Castlemain (Lord) *v.* Lord Craven 144
Cater, *Re* 119
Cavaly Vencata Narrainapah *v.* The Collector of Masulipatam ... 312

Page
Cavendish v. Greaves 274
———, *Ex parte* 294
Chadwick v. Maden 89
Challen v. Shippam 141
Chalmer v. Bradley 234, 260, 266, 303, 321, 326
Chaloner v. Butcher 321
Chambers v. Howell 254, 265
——— v. Minchin 200, 212, 236
——— v. Waters 258
Champion v. Rigby 261
Chaplin v. Chaplin 48
——— v Young 255
Charitable Corporation v. Sutton 136
Cherry v. Mott 360
Chertsey Market, *Re* 168, 242, 288
Chester v. Rolfe 221, 226
Chesterfield v. Janssen 261
Childers v. Childers 19, 35, 48
Chinna Rangaiyangar v. Subbraya Mudali 398
——— Ummayi v. Tegarai Chetti 48
Chippendale, *Ex parte* 215, 216
Chottoo Misser v. Jemah Misser 148
Chowdhry Herasutoollah v. Brojosoondur Roy 311
Chowne v. Baylis 61
Christ's Hospital v. Budgin 90, 91
Christopher v. White 245
Christy v. Courtenay 68, 92, 95
Chudleigh's Case 6
Chunder Nath Moitro v. Kristo Komul Singh 98
Chundramoney Dossee v. Motilal Mullick 40, 370
Church v. Brown 449
——— Estate Charity, *Re*... 361
Churchill v. Hobson (Lady) 121
——— v. Marks 46, 47
Civil v. Rich 154
Clack v. Holland 139, 184, 324
Clacke v. Carlon 245
Clark v. Taylor 359
Clark's Trust, *Re* 360
Clarke v. Malpas 112
——— v. Ormonde (Earl of) 157, 158
——— v. Swaile 261, 263
——— v. Willott 67
Clarkson v. Hanway 117
Clayton's Case 300, 302
Clegg v. Edmonson 87, 108, 118
——— v. Fishwick 108
Clements v. Hall 108
Clephane v. Lord Provost of Edinburgh 360
Clifton v. Goodbun 37
——— v. Lombe 78
Clough v. Bond 138, 160, 198, 236
——— v. Dixon 205

Page
Clough v. Lambert 54
Clowdsley v. Pelham 78
Clutton, *Ex parte* 132, 435
Coape v. Arnold 21
Coard v. Holderness 85
Cock v. Goodfellow 161
Cocker v. Quayle 184
Cockrell v. Cholmeley 261
Coe's Trust, *Re* 154
Coffin v. Coffin 145
Colchester (Mayor of) v. Lowten 124
Cole v. Muddle 323, 324
—— v. Sewell 38
—— v. Wade 19
Colegrave v. Manby 108
Coleman v. Croker 65
——— v. Sarrel 54
Coles v. Trecothick 259, 262, 263
Collins v. Burton 65
——— v. Cary 245
——— v. Vining 154
Collinson, *Re* 442
——— v. Collinson 94
——— v. Lister 212, 216
——— v. Patrick 57
Columbine v. Penhall 61
Commissioners of Charitable Donations v. Archbold 284
——— of Public Works v. Harby 280
Congregational Church Smethwick, *Re* 241
Conry v. Caulfield 156, 343
Consett v. Bell 215, 343
Consol Co. v. Riley 281
Conyngham v. Conyngham... ... ... 121, 122
Cood v. Cood 31
Cook v. Addison 319
Cooke v. Fryer 24
—— v. Gwavas 83
—— v. Lamotte 111
Cookney v. Anderson 28
Cookson v. Cookson 320
Coombes v. Brookes 434
Coombs v. Coombs 222
Coope v. Carter 188
Cooper v. Cooper 217
——— v. Phibbs 108
——— v. Wyatt 45
Copinger v. Crehane 155
Coppin v. Fernyhough 109
Cornbury (Lord) v. Middleton 273
Cornish v. Clark 64
Corser v. Cartwright 231, 232
Cosser v. Radford 76
Cossinath Bysack v. Hurrosoondery 125

Page
Costabidie v. Costabidie 82, 153
Cothay v. Sydenham 176
Cottam v. Eastern Counties R. Co. 201, 273
Cotteen v. Missing 57
Cotterill's Trust, *Re* 436
Cottington v. Fletcher 48, 83
Course v. Humphrey 346
Courtenay v. Courtenay 331, 332
Courtney v. Rumley 213
Coutts v. Ackworth 72
Coventry (Mayor of) v. Attorney-General 284
——— v. Coventry 333
Cowell v. Gatcombe 237
Cowie, *Re* 142, 250
Cowley (Earl) v. Wellesley 220
Cowman v. Harrison 79
Cox v. Barnard 54
——— v. Bockett 47
——— v. Parker 157
Crabb v. Crabb 94, 95
Crabtree, *Re* 442
——— v. Bramble 321
Crackelt v. Bethune 167, 313
Cradock v Piper 245
Craig v. Wheeler 152
Crallan v. Oulton 76
Cramer v. Cramer 426
Cranstoun (Lord) v. Johnston 29, 31, 32
Craven v. Bradley 47
——— v. Craddock 171
Crawley v. Crawley 149
Crawshay v. Collins 244, 253
Cresswell v Dewell 176, 192
Crewe v. Dicken 240
Crinivasammal v. Vijayammal 51
Crockett v. Crockett 82
Croker v. Martin 68
Crop v. Norton 87, 89
Crosskill v. Bower 255
Crossley v. Crowther 287
——— v. Elworthy 62, 64
Crowe v. Ballard 257
Crowe's Mortgage, *Re* 424
Cuff v. Hall 174
Cullingworth v. Loyd 76
Culpepper v. Aston 83
Cummins v. Cummins 121, 251
——— v. Bromfield 346
Cunningham v. Plunket 55
Cunynghame's Settlement, *Re* 40
Curnick v. Tucker 78
Currie v. Nind 68
Curteis's Trust, *Re* 86

Page
Curtis v. Lukin 272
——— v. Perry 35
——— v. Price 65
Custance v. Cunningham 86
Cuthbert v. Purrier 177

D.

D'Adhemar (Viscountess) v. Bertrand 455
Dakin v. Whimper 67
Dalgleish's Settlement, *Re* 423, 437
D'Almaine v. Anderson 328
——— v. Moseley 85
Dalrymple v. Khoondkar Azeezul Islam 386
Damodar Mohapattur v. Birjo Mohapattur 312
Dance v. Goldingham 233, 288
D'Arcy v. Croft 221
——— v. Hall 252
Darke v. Martyn 142
——— v. Williamson 215, 220
Darvill v. Terry 61
Das Merces v. Cones 350, 352
Daubeny v. Cockburn 65
Davall v. New River Co. 157
Davenport v. Stafford 167
Davey v. Durrant 222
——— v. Ward 242
Davies, *Ex parte* 442
——— v. Ashford 321
——— v. Hodgson 180
——— v. Otty 48, 59, 90
Davis, *Ex parte* 328
——— v. Chanter 434
——— v. Dendy 212
——— v. Jenkins 365
——— v. Spurling 109, 205, 236, 237
Davis's Trust, *Re* 418, 434
Dawson v. Clark 86, 209
——— v. Hearn 272
——— v. Small 49, 85
Day v. Croft 340
Dayal Jairaj v. Jivraj Ratansi 292
Deacon v. Colquhoun 89
Dearle v. Hall 276
Debendronath Mullick v. Odit Churn Mullick... 377
Debnath Roy Chowdhry v. Gudadhar Dey 101
De Bussche v. Alt 190
Deerhurst (Lord) v. Duke of St. Albans 24
Deeth v. Hale 271
De Hoghton v. Money 65, 67
Delane v. Delane 87
De la Salle v. Moorat 174
Delevante, *Re* 188
Delhi and London Bank v. Wordie 28

Page
Delroos Banoo Begum v. Nawab Syud Ashgur Ally Khan, 384, 404, 405
Delrus Banoo Begum v. Hadjee Aboor Ruhman 404
DeManneville v. Crompton... 242
Denning v. Ware 54
Dennis, *Re* 436
Dent v. Bennett 111, 115
Denton v. Davies 295
——— v. Denton 143, 263, 269
DeSouza v. DeSouza 137, 149, 151, 160, 173
——— v. The Secretary of State 121
De Themmines v. DeBonnestal 361
Dettmar v. Metropolitan and Provincial Bank... 113
Devaynes v. Robinson 170, 174, 184, 344
Devey v. Thornton 178, 269
De Visme, *Re* 91, 92
Devoy v. Devoy 95
Dewar v. Maitland 418
Dhanjibhai v. Kharsetji Ratnagar 14
Dhonender Chunder Mookerjee v. Mutty Lall Mookerjee ... 258
Dhurm Das Pandey v. M. S. Sama Soondri Dibiah 98
——— Singh v. Kissen Singh 398, 402
Dibbs v. Goren 180
Dickinson's Trusts, *Re* 435
Dickson v. Swansea Railway Co. 274
Dilkes v. Broadmead 181
Dillon v. Coppin 54, 55
Dilwyn v Llewellyn 54, 59
Dimes v. Scott 193
Dimsdale v. Dimsdale 118
Dix v. Burford 123
Dixon v. Gayfere 321
Dobson v. Land 140, 251
Docker v. Somes 251, 253, 315
Dodkin v. Brunt 335
Doe v. Ball 59
—— v. Godwin 335
—— v. Harris 120, 121, 133
—— d. Howard v. Pestonji Manockji 372
—— d. Jaun Bibee v. Abdoollah Barber 382, 383, 388
—— v. Manning 61
—— v. Knight 72
—— v. Roberts 48
—— v. Routledge 68
—— v. Rusham 60, 68, 72
—— v. Webber 67
Dolan v. Macdermot 19, 357
Dolder v. Bank of England... 337
Dolphin v. Aylward 67, 68
Donaldson v. Donaldson 56
Donzelle v Kedarnath Chuckerbutty 101
Doorga Pershad Roy Chowdhry v. Tarra Pershad Roy Chowdhry 314
Doran v. Wiltshire 231
Dorchester (Lord) v. Earl of Effingham 24

Page

Dorin *v.* Dorin 37
Dornford *v.* Dornford 166
Douglas *v.* Archbutt 247, 248, 255
——— *v.* Congreve 23
Dove *v.* Everard 122
Dowley *v.* Winfield 177
Down *v.* Worrall 360
Downes *v.* Bullock 180
——— *v.* Grazebrook 168, 258, 259, 262, 264
Doyal Chand Mullick *v.* Syud Kiramut Ali 381, 385, 388
Doyle *v.* Blake 121, 132, 177, 200, 205, 235, 238
Doyley *v.* Doyley 360
Doyly *v.* Sherratt 240
Drake *v.* Whitmore 170
Draper's Settlement, *In re* 415, 436
Drayson *v.* Pocock 168
Drew *v.* Martin 68, 90, 92, 94
Drummond *v.* Tracey 131
Dubless *v.* Flint 336
Dufaur *v.* The Professional Life Assurance Co. 278
Dulwich College, *In re* 364
Dumas, *Ex parte* 131
Dummer *v.* Pitcher 92, 94, 95
Dumper *v.* Dumper 94
Dunbar *v.* Tredennick 261, 289, 291, 292, 293
Duncombe *v.* Nelson 226
Dunnage *v.* White 85
Dunne *v.* Snowden 177
Durga Pershad *v.* Asa Ram 305
Dwarkanath Bysack *v.* Burroda Pershad Bysack 371
Dyer *v.* Dyer 86, 90, 91
Dyster, *Ex parte* 35

E.

East India Co. *v.* Henchman 107
East Indian Railway Co. *v.* The Bengal Coal Co. 28
Eastern Counties Railway Co. *v.* Hawkes 171
Eaton *v.* Watts 79
Eaves *v.* Hickson 177, 179, 236
Ebrand *v.* Dancer 88
Ede *v.* Knowles 64, 67
Edenborough *v.* Archbishop of Canterbury 347
Edwards *v.* Grove 226, 283
——— *v.* Harben 61
——— *v.* Jones 56
——— *v.* Lewis 107
——— *v.* Warden 28
Eeles *v.* England 78
Egbert *v.* Butter 138
Egerton *v.* Earl Brownlow 20
Eland *v.* Eland 230, 231
Elder widow of Raja Chutter Sein *v.* Younger widow of Raja Chutter Sein 376

Page
Delroos Banoo Begum v. Nawàb Syud Ashgur Ally Khan, 384, 404, 405
Delrus Banoo Begum v. Hadjee Aboor Ruhman 404
DeManneville v. Crompton... 242
Denning v. Ware 54
Dennis, *Re* 436
Dent v Bennett 111, 115
Denton v. Davies 295
——— v. Denton 143, 263, 269
DeSouza v. DeSouza 137, 149, 151, 160, 173
——— v. The Secretary of State 121
De Themmines v. DeBonnestal 361
Dettmar v. Metropolitan and Provincial Bank... 113
Devaynes v. Robinson 170, 174, 184, 344
Devey v. Thornton 178, 269
De Visme, *Re* 91, 92
Devoy v. Devoy 95
Dewar v. Maitland 418
Dhanjibhai v. Kharsetji Ratnagar 14
Dhonender Chunder Mookerjee v. Mutty Lall Mookerjee ... 258
Dhurm Das Pandey v. M. S. Sama Soondri Dibiah 98
——— Singh v. Kissen Singh 398, 402
Dibbs v. Goren 180
Dickinson's Trusts, *Re* 435
Dickson v. Swansea Railway Co. 274
Dilkes v. Broadmead 181
Dillon v. Coppin 54, 55
Dilwyn v Llewellyn 54, 59
Dimes v. Scott 193
Dimsdale v. Dimsdale 118
Dix v. Burford 123
Dixon v. Gayfere 321
Dobson v. Land 140, 251
Docker v. Somes 251, 253, 315
Dodkin v. Brunt 335
Doe v. Ball 59
—— v. Godwin 335
—— v. Harris 120, 121, 133
—— d. Howard v. Pestonji Manockji 372
—— d. Jaun Bibee v. Abdoollah Barber 382, 383, 388
—— v. Manning 61
—— v. Knight 72
—— v. Roberts 48
—— v. Routledge 68
—— v. Rusham 60, 68, 72
—— v. Webber 67
Dolan v. Macdermot 19, 357
Dolder v. Bank of England... 337
Dolphin v. Aylward 67, 68
Donaldson v. Donaldson 56
Donzelle v Kedarnath Chuckerbutty 101
Doorga Pershad Roy Chowdhry v. Tarra Pershad Roy Chowdhry 314
Doran v. Wiltshire 231
Dorchester (Lord) v. Earl of Effingham 24

Page
Dorin v. Dorin 37
Dornford v. Dornford 166
Douglas v. Archbutt 247, 248, 255
——— v. Congreve 23
Dove v. Everall 122
Dowley v. Winfield 177
Down v. Worrall 360
Downes v. Bullock 180
——— v. Grazebrook 168, 258, 259, 262, 264
Doyal Chand Mullick v. Syud Kiramut Ali 381, 385, 388
Doyle v. Blake 121, 132, 177, 200, 205, 235, 238
Doyley v. Doyley 360
Doyly v. Sherratt 240
Drake v. Whitmore 170
Draper's Settlement, *In re* 415, 436
Drayson v. Pocock 168
Drew v. Martin 68, 90, 92, 94
Drummond v. Tracey 131
Dubless v. Flint 336
Dufaur v. The Professional Life Assurance Co. 278
Dulwich College, *In re* 364
Dumas, *Ex parte* 131
Dummer v. Pitcher 92, 94, 95
Dumper v. Dumper 94
Dunbar v. Tredennick 261, 289, 291, 292, 293
Duncombe v. Nelson 226
Dunnage v. White 85
Dunne v. Snowden 177
Durga Pershad v. Asa Ram 305
Dwarkanath Bysack v. Burroda Pershad Bysack 371
Dyer v. Dyer 86, 90, 91
Dyster, *Ex parte* 35

E.

East India Co. v. Henchman 107
East Indian Railway Co. v. The Bengal Coal Co. 28
Eastern Counties Railway Co. v. Hawkes 171
Eaton v. Watts 79
Eaves v. Hickson 177, 179, 236
Ebrand v. Dancer 88
Ede v. Knowles 64, 67
Edenborough v. Archbishop of Canterbury 347
Edwards v. Grove 226, 283
——— v. Harben 61
——— v. Jones 56
——— v. Lewis 107
——— v. Warden 28
Eeles v. England 78
Egbert v. Butter 138
Egerton v. Earl Brownlow 20
Eland v. Eland 230, 231
Elder widow of Raja Chutter Sein v. Younger widow of Raja Chutter Sein 376

Page
Ellerthorpe, *Re* 420
Elliot *v.* Elliot 95
Elliott *v.* North-Eastern Railway Co. 145
Ellis *v.* Barker 153
—— *v.* Houston 36
—— *v.* Selby 356
Ellis's Settlement, *Re* 427, 428
Ellison *v.* Airey 247
——— *v.* Ellison 53, 54, 59, 71
Ellison's Trust, *Re* 133, 435
Else *v.* Barnard 225
Elsee, *Ex parte* 212
Elsey *v.* Lutyens 346
Emmet *v.* Clarke 328, 435
England *v.* Downs 137
Ernest *v.* Croysdill 297
Espin *v.* Pemberton 280
Evan *v.* The Corporation of Avon 124, 130
Evans, *Re* 218
——— *v.* Bear 141
——— *v.* Bicknell 212
——— *v.* Coventry 340
——— *v.* John 122
——— *v.* Jones 62
——— *v.* Stokes 345
Evelyn *v.* Templar 54
Everett *v.* Prythergch 289, 340
Evroy *v.* Nicholas 128
Exhall Coal Co., *Re* 275
Eyre *v.* Shaftesbury (Countess of) 335
—— *v.* Dolphin 109
Eyston, *Ex parte* 47

F.

Faez Buksh Chowdhry *v.* Fukeeroodeen Mahomed Ahassun Chowdhry 102
Fagg's Trust, *Re* 328
Fakurudin Sahib *v.* Ackeni Sahib 397, 402
Falkner *v.* The Equitable Society 224
Farmer *v.* Dean 265
Farr *v.* Sheriffe 346
Fausset *v.* Carpenter 47
Fawcett *v.* Whitehouse 107
Fearns *v.* Young 149, 213
Featherstonhaugh *v.* Fenwick 108
Fegredo *v.* Mahomed Mudessur 385
Fellows *v.* Mitchell 194
Fellows' Settlement, *Re* 442
Fenwick *v.* Greenwell 123, 184
Feoffees of Heriot's Hospital *v.* Ross 212
Ferguson *v.* Ferguson 141
——— *v.* Todman 83
Ferrars *v.* Cherry 293

[Page

Field *v.* Donoughmore (Lord) 76, 118
——— *v.* Peckett 173, 221
Finch *v.* Finch 90, 94
——— *v.* Pescott 216
Finden *v.* Stephens 80, 216
Finlay *v.* Howard 284
Firmin *v.* Pulham 119, 269, 271
Fish *v.* Klein 129
Fisk *v.* Attorney-General 49, 360
Fitch *v.* Weber 85, 86
Fitzgerald, *In re* 331
——— *v.* Jervoise 173
Fletcher *v.* Fletcher 54, 58, 72, 287
——— *v.* Green 163, 193
Flockton *v.* Bunning 253, 320
Floyer *v.* Bankes 38
Foley *v.* Burnell 287
——— *v.* Wontner 335, 362
Folkingham *v.* Croft 449
Forbes *v.* Ball 78
——— *v.* Limond 76
——— *v.* Peacock 231
——— *v.* Ross 161, 313
Ford *v.* Hopkins 297
——— *v.* Stuart 69
——— *v.* White 324
Fordham *v.* Speight 78
——— *v.* Wallis 181
Fordyce *v.* Bridges 283
——— *v.* Willis 52, 90
Forrest *v.* Forrest 91
Forshaw *v.* Higginson 220, 221, 222, 331, 332
——— *v.* Welsby 59, 71, 115
Forster *v.* Abraham 132, 329
——— *v.* Ridley 244
Fortescue *v.* Barnett 56, 209, 278
Fosbroke *v.* Balguy 252
Foster *v.* Cockrell 281
——— *v.* Dawber 133
——— *v.* Deacon 83
——— *v.* Parker 433
Fowkes *v.* Pascoe 85, 86, 92, 93
Fowler *v.* Fowler 49, 355
——— *v.* Reynal 162
Fox *v.* Fox 79, 81
——— *v.* Hawkes 55
——— *v.* Mackreth 257, 291
Francis *v.* Francis 163, 215
Fraser *v.* Palmer 244
——— *v* Thompson 69
Frederick *v.* Hartwell 175
Freeman *v.* Cox 338
——— *v.* Fairlie 52, 133, 157, 336, 339

Page
Freeman v. Pope 61, 64
French v. Davidson 242
——— v. French 64
——— v. Hobson 192
Freshfield's Trust, *In re* 277
Frith v. Cartland 131, 156, 296, 297, 335
Frodsham v. Frodsham 439
Fry v. Fry 140, 174, 221, 225
Fryer, *Re* 171, 188, 194
Fulham, *Re* 442
Fuller v. Knight 169
Futtoo Bibee v. Bhurrutlall Bhukut 386
Futvoye v. Kennard 438
Fyler v. Fyler 184, 240

G.

Gale v. Williamson 62
Games, *Ex parte* 62
Ganendra Mohun Tagore v. Upendra Mohun Tagore ... 11, 157
Ganes Singh v. Ramgopal Singh 403
Gangabai v. Thava Mulla 358, 371
Gardiner v. Downes 271, 331, 332
——— v. Fell 52, 133
Gardner v. Cowles 418, 431
——— v. Ennor 114
Gardner's Trusts, *Re* 421
Garner v. Hannyngton 211
Garrard v. Lord Lauderdale 54, 73, 74, 75
Garrett v. Noble 138, 173
——— v. Wilkinson 92, 110
Garrick v. Taylor 88, 89
Garth v. Cotton 143, 144, 145
Garthshore v. Chalie 221
Gartside's Estate, *Re* 434
Gascoigne v. Thwing 88
Gaskell v. Harman 137
Gaunt v. Taylor 346
Gee v. Liddell 53
Gent v. Harrison 220
George v. George 221
Ghost v. Waller 236
Gibbins v. Taylor 184
Gibbs v. Rumsey 86
Gibson v. Jeyes 111, 259, 262
——— v. Overbury 278
——— v. Russell 117
——— v. Smith 145
——— v. Wells 143
Giddings v. Giddings 108, 109
Gilbert v. Overton 56, 57, 71, 72
Gill v. The Attorney-General 205
Gillett v. Peppercorn 107
Gillies v. Longlands 321

Page
Girdharee Lall v. Kantoo Lall 308
Gisborne v. Gisborne 154
Gladdon v. Stoneman 340
Glaister v. Hewer 92
Glanville's Trusts, *Re* 431
Glegg v. Rees 71
Gloucester (Corporation of) v. Wood 356
——— (Mayor of) v. Osborn 356
Glynn v. Hood 281
Gnanabhai v. Srinivasa 60, 63, 105
Gobindmani Dasi v. Sham Lal Bysak 147
Godden v. Crowhurst 44
Godfrey v. Watson 212
Godsal v. Webb 57
Gogun Chunder Sein v. Joydoorga 148
Goldsmith v. Russell 65
Goluck Monee Dassee v. Kishenpersad Kanoongoe 147
Gomley v. Wood 244, 246
Gooche's Case 59
Goode v. Burton 137, 211
Goodman v. De Beauvoir 288
Goodright v Moses 67
Goodson v. Ellison 217, 270, 273
Goodwin v. Fielding 169
Goodwin's Trust, *Re* 36
Gopal Chand Pande v. Babu Kunwar Singh 369
Gopee Krist Gosain v. Gungapersaud Gosain 13, 98, 99, 100
Gopeenath Naik v. Judoo Ghose 107
Gordon, *Re* 122
——— v. Traill 213
Gore v. Bowser 123
Goring v. Bickerstaff 273
Gosling v. Gosling 90, 272
Gossain Dowlut Geer v. Bissessur Geer 378
Gott v. Nairne 49
Gough v. Bage 431, 432
Gould v. Fleetwood 248
Goureekanth Dass v. Bhogobutty Dassee 147
Governesses' Institution v. Rusbridger 338
Governors of Christ's Hospital, *Re* 171
Gower v. Mainwaring 19, 283
Grace v. Baynton 433
Graham v. Birkenhead Railway Co. 190
——— v. Hill 121
Grant v. Grant 55, 58
Grant's Trusts, *Re* 442
Granville (Earl) v. M'Neile 122
Graves, *Ex parte* 136
——— v. Dolphin 41, 274
——— v. Strahan 137, 160
Gray v. Haig 157, 318
——— v. Lewis 292
——— v. Siggers 152

Page
Grayburn v. Clarkson 173
Great Luxembourg Railway Co. v. Magnay 254
Greedharee Doss v. Nundo Kissore Doss 378
Green, *Re* 439, 458
——— v. Bank of England 88
——— v. Britten 151
——— v. Folgham 25
——— v. Ingham 278
——— v. Marsden 79
——— v. Rutherford 130
——— v. Rutherforth 368
——— v. Spicer 41, 42, 274
Greender Chunder Ghose v. Mackintosh ... 186, 231, 294, 304
Greendy v. Buckeridge 436
Greenhouse, *Ex parte* 285
Greening v. Beckford 281
Greenwood v. Wakeford 333
Gregory v. Gregory 291
Grenville Murray v. Clarendon (Earl of) 217
Grey v. Grey 90, 94, 95, 96
Griffin, *Ex parte* 240
——— v. Griffin 107, 108
Griffith v. Evans 78
——— v. Rickets 73
Griffiths v. Porter 180, 236
——— v. Robins 117
Griesbach v. Fremantle 321
Grigley v. Cox 324
Groom v. Booth 231
Grose v. Amirtamayi Dassi 146
Groves v. Groves 35, 48, 87, 88, 89
Gubbins v. Creed 251
Gude v. Worthington 242
Guibert's Trusts, *Re* 330
Gulam Hussain Saib Saiyad v. Adji Ajam Saib Kuraishi 385, 387
Gully v. Bishop of Exeter 70
——— v. Cregoe 82
Gunson v. Simpson 432

H.

Habergham v. Vincent 85
Hadley, *Ex parte* 328, 434
Haigh v. Kaye 48, 49, 85
Hajee Kalub Hossein v. M. S. Meherun Bebee ... 382, 405
——— Nooroollah v. Meer Waris Hossein 390
Hakeem Meah v. Beejoy Patnee 104
Haldenby v. Spofforth 170
Hale v. Saloon Omnibus Co 60, 61
Hales v. Cox 54, 68, 72
Hall v. Franck 240
——— v. Hall 71
——— v. Hallet 257, 265, 289, 291, 313, 347
——— v. Laver 215

Page
Hall v. Noyes 261
—— v. Palmer 54
—— v. Warren 361
Hallett's Estate, *Re* 141, 300
Halliday v. Hudson 84
Hamilton v. Ball 48
——— v. Denny 108
——— v. Fry 330
——— v. Waring 35
——— v. Wright 243, 251, 289
Hammond v. Neame 81
——— v. Walker 338
Hampshire v. Bradley 269
Hanbury v. Kirkland 163, 195, 198, 199
——— v. Spooner 248
Hancom v. Allen 198
Hankey v. Garrett 313
Hannah v. Hodson 271
Hanson v. Gardiner 145
Harbin v. Darby 245, 249
Harcourt v. Seymour 322
Harding v. Glynn 78
Hardwicke (Lord) v. Vernon 289, 291
Hardy v. Caley 184
Harford's Trusts, *Re* 425
Hargthorpe v. Milforth 201
Harland v. Binks 62, 76
——— v. Trigg 78, 79
Harman v. Richards 61, 69
Harper v. Hayes 169
Harris v. Harris 180, 284
——— v. Payne 151
——— v. Tremenheere 114
Harrison v. Asher 208
——— v. Harrison 167
——— v. Randall 220
——— v. Stewardson 345
——— v. Thexton 139, 162
Harrison's Trust, *Re* 435, 437
Hart v. Debenham 340
—— v. Tribe 78
Hartley v. Burton 270
Hartnall, *Re* 427
Harvey v. Mount 115
Hatch v. Hatch 114, 118
Hathornthwaite v. Russel 289, 340
Hatton v. May 46
Havelock's Trust, *Re* 436
Havers v. Havers 340
Hawkins' Trusts, *Re* 248
Hay v. Bowen 178
—— v. Coventry (Earl of) 38
Hays, *Ex parte* 227

Page
Hayter v. Trego 359
Haywood v. Ovey 344
Heard v. Pilley 90
Heartley v. Nicholson 53, 54, 55
Heath v. Chapman 350
——— v. Crealock 292, 293, 294
Heaton, *Ex parte* 319
Hemanginee Dossee v. Jogendro Narain Roy 105
Hemming v. Maddick 216
Henderson v. Hay 449
——— v. McIver 249
Henley v. Phillips 348
Hennessey, *Ex parte* 279
———, *Re* 280
——— v. Bray 123
Hepworth v. Hepworth 91, 92, 96
Herbert's Will, *Re* 437
Hercy v. Dinwoody 261
Hereford (Bishop of) v. Adams 353
Herne v. Benbow 143
Herring v. Clarke 432
Hervey v. Audland 54
Hewett v. Foster 198, 200, 205, 348
Hext v. Gill 145
Hiatt v. Hillman 447
Hibbard v. Lambe 19, 284
Hibbert v. Hibbert 215
Hichens v. Congreve 107
Hickman v. Upsall 177
Hicks v. Hicks 313
Hidait-oon-nissa v. Syud Afzul Hossein 59, 385, 405
Hide v. Haywood 213
Higinbotham v. Holme 48
Hill v. Barclay 450
——— v. Boyle 273
——— v. Buckley 169, 224
——— v. Crook 37
——— v. Reardon 32
——— v. Teenery 184
——— v. Turner 32
Hill's Trust, *Re* 435
Hinde v. Blake 339
Hindmarsh v. Southgate 128
Hindson v. Weatherill 114
Hinton, *Ex parte* 45
Hitch v. Leworthy 240
Hoare v. Osborne 353, 361
Hobday v. Peters 139, 184, 217
Hobson v. Bell 223, 224
——— v. Trevor 25
Hodges, *In re* 242
——— v. Wheeler 420
——— Davey v. Ward, *In re* 154

Page
Hodgson v. Hodgson 426
Hodson's Settlement, *Re* 434
Hoghton v. Hoghton 111, 117
Holbrook's Will, *Re* 430
Holdsworth, *Ex parte* 272
Holford v. Phipps 175, 269, 270
Holgate v. Haworth 313
——— v. Jennings 151
Holland v. Baker 345
Hollingsworth v. Shakeshaft 314
Holloway v. Millard 62
——— v. Radcliffe 321
Holmes v. Bell 344
——— v. Dring 160
——— v. Penney 43, 62, 70, 153
Holt v. Dewell 281
——— v. Sindrey 36
Hone v. Pringle 205
Hood v. Clapham 180
——— v. Oglander 41, 79
Hope v. Carnegie 58
——— v. Liddell 171
Hopgood v. Parkin 179
Hopper v. Conyers 303
Hora v. Hora 81
Horde v. Suffolk (Earl of) 153, 356
Hori Dasi Dabi v. The Secretary of State for India 376
Horn v. Horn 231
Horton v. Brocklehurst 157
Horwood v. West 78
Hosking v. Nicholls 346
Hoskins, *Re* 438
Houghton, *Ex parte* 87
House v. Way 149
Hovey v. Blakeman 200, 201, 205
Howard v. Chaffer 230
——— v. Papera 289, 340
——— v. Rhodes 332
Howe v. Dartmouth (Earl of) 139, 149, 150, 198
——— v. Howe 87
Howse v. Chapman 354
Hoy v. Master 79
Hoyes v. Kindersley 95
Hubbard v. Young 151
Hughes, *Ex parte* 260, 290, 291, 327
Hughes, *Re* 281
——— v. Empson 173
——— v. Howard 109
——— v. Stubbs 55
Hughes' Settlement, *Re* 422, 436
Hughson v. Clarkson 344
Huguenin v. Basley 89, 111, 112, 114, 115, 117, 118
Hull v. Christian 248

Page
Hulme v. Hulme 328
—— v. Tennant 323
Humberston v. Humberston 23
Humphry's Estate, *Re* 435
Hungerford v. Earle 69
Hunooman Persaud Panday v. M. S. Babooee Munraj Koonwaree 306, 309
Hunter v. Atkins 111, 114, 115
—— v. Bullock 49
Hunt-Foulston v. Furber 41
Hurpershad v. Sheo Dyal 51
Hurrosoondery v. Cowar Kistonath 40
Hurruck Chund Sahoo v. Golam Shurruff 388
Hurrydass Dutt v. Rungunmoney 146
—— —— v. S. M. Uppornah Dossee 146
Hurry Sunker Mookerjee v. Kali Coomar Mookerjee 105
Hurst v. Hurst 175
Hussain Beebee v. Hussain Sherif 388
Hutcheson v. Hammond 220
Hutchinson v. Stephens 421
—— —— v. Townsend 344
Hylton v. Hylton 113

I.

Imperial Land Co. of Marseilles, *Re* 254
—— Mercantile Credit Association v. Coleman ... 254, 255
Ingle v. Partridge 141, 171, 236, 338
Innes v. Mitchell 32
Irby v. Irby 232, 274, 325
Irons v. Smallpiece 54
Irvine v. Sullivan 78, 80
Isaacs v. Weatherstone 338
Izod v. Izod 283, 360

J.

Jaafar Mohi-u-din Sahib v. Aji Mohi-u-din Sahib ... 376, 377, 388
Jackson, *In re* 278, 455
—— v. Hamilton 274
—— v. Welsh 108
Jacob v. Lucas 335
Jacubs v. Rylance 322
James, *Ex parte* ... 257, 259, 260, 263, 264, 289, 290, 291
—— v. Dean 108, 109
—— v. Frearson 121, 122, 133, 136
—— v. May 216
Jamsetji Jijibhai v. Sona Bhai 53
Jamyatram Ramchandra v. Parbudhas Hathi 62
Jan Ali v. Ram Nath Mundul 397, 402
Janmajoy Mazumdar v. Keshublal 177
Jarman's Estate, *Re* 355
Jarratt v. Aldam 118
Jarvis v. Chandler 32

Page
Jatindra Mohan Tagore v. Ganendra Mohan Tagore ... 14, 33, 35, 40, [370, 376
Jeans v. Cooke 95
Jeffrey v. De Vitre 82
Jeffreys v. Dickson 448
——— v. Drysdale 439
——— v. Jeffreys 53, 54, 68, 69, 72
Jemmit v. Verril 356
Jenkins v. Keymis 69
——— v. Mitford 269
Jenks v. Holford 25
Jenkyn v. Vaughan 64
Jenner v. Jenner 112
Jerdein v. Bright 274
Jervis v. Wolferstan 180, 181, 216
Jervoise v. Duke of Northumberland 21, 23, 24
Jesse v. Bennett 344
Jevers v. Jevers 117
Jewun Doss Sahoo v. Shah Kubeer-ood-deen ... 383, 384, 385
Jeyangarulavaru v. Sri Hati Durma Dossji 403, 405
Jivandas Keshavji v. Framji Nanabhai 51
Joel v. Mills 46, 76
Johns v. James 73
Johnson v. Johnson 85, 149
——— v. Kennett 230
——— v. Kershaw 76
——— v. Newton 141, 142, 313
——— v. Telford 213
Johnston v. Rowlands 80
——— v. Swann 356
Jolland v. ——— 356
Jones v. Boulter 70
——— v. Croucher 67
——— v. Farrell 273
——— v. Foxall 167
——— v. Gibbons 209, 278
——— v. Greatwood 81
——— v. Higgins 137, 189, 190
——— v. Jones 59
——— v. Lewis 140, 269
——— v. Lock 55
——— v. Powell 232
——— v. Powles 293
——— v. Williams 350, 354
Jorden v. Money 190
Josselyn v. Josselyn 272
Joy v. Campbell 48, 199, 205, 237, 296
Joyce's Estate, *Re* 418, 435
Judah v. Judah 350
——— v. Mirza Abdool Kurreem 60
Juddo Nundun Burral v. Kalee Coomar Ghose 386
Juggernauth Doss v. Brijnath Doss 28
Juggessur Buttobyal v. Rajah Roodro Narain Roy 374
Juggodumba Dossee v. Puddomoney Dossee 28

Page
Juggutmohini Dossee *v.* M. S. Sookheemoney Dossee 14, 369, 380
Jumoona Dassya Chowdhrain *v.* Bama Soonderai Dassya Chowdhrain 148
Jusagheri Gosamiar *v.* The Collector of Tanjore 398

K.

Kahandas Narrandas, *Re* 15, 418
Kaihur Singh *v.* Roop Singh 308
Kalee Churn Giri *v.* Golabi 403
——— Gir Gossain *v.* Bungshee Mohun Doss 376
——— Nath Kur *v.* Doyal Kristo Deb 106
Kally Doss Mitter *v.* Gobind Chunder Paul 103
——— Prosono Mitter *v.* Gopee Nauth Kur 40
Kamal Singh *v.* Batul Fatima 305
Kamavadhani Venkata Subbaiya *v.* Joysa Narasingappa ... 147
Kanye Dass Byragee *v.* Ramgopal Ghose 59
Kasheshurree Dassee *v.* Krishnakaminee Dassee 387
Kattama Natchiar *v.* Dorasinga Tever 148
Kaye, *Re* 131
——— *v.* Powell 268
Kearsley *v.* Woodcock 44, 45, 46
Keats *v.* Hewer 94
Keech *v.* Sandford 108
Kekewich *v.* Manning 56, 57
Kellaway *v.* Johnson 160, 184
Kellie *v.* Fraser 28
Kelson *v.* Kelson 70
Kendall *v.* Granger 350
Kennedy *v.* Daly 83, 156, 313
——— *v.* Cassilis (Earl of) 32
Kenney *v.* Browne 290
Kent *v.* Jackson 190
——— *v.* Riley 63, 64
Keshub Chunder Sein *v.* Vyasmonee Dossia 105
Khajah Ashruf Hossein *v.* M. S. Hazara Begum 399
Kherodemoney Dossee *v.* Doorgamoney Dossee ... 40, 186, 304
Khuggender Narain Chowdhry *v.* Sharupgir Oghorenath ... 378
Khusal Chand *v.* Mahadevgiri 350, 374
Kiddill *v.* Farnell 56, 208
Kidney *v.* Coussmaker 64, 261
Kilbee *v.* Sneyd 141, 238
Kildare (Earl of) *v.* Eustace 29, 30, 31
Killick *v.* Flexney 257, 265
Kilpin *v.* Kilpin 91
Kilvert's Trusts, *Re* 357
Kilworth *v.* Mountcashell 323
King, *Ex parte* 323
———, *Re* 56, 58, 348
——— *v.* Anderson 260, 265
——— *v.* Archbishop of Canterbury 155
——— *v.* Bellord 127
——— *v.* Denison 84, 85
——— *v.* King 119, 271

Page
King *v.* Savery 118
Kingdom *v.* Bridges 90
——— *v.* Castlemain 184
Kingston, *Ex parte* 141
——— (Earl of) *v.* Pierepoint (Lady) 35
Kinlock *v.* The Secretary of State for India 125, 129
Kirby *v.* Mash 287
Kirkman *v.* Booth 243, 252, 255
Kishore Bon Mohunt *v.* Kalee Churn Giree 403, 405
Knatchbull *v.* Fearnhead 123
——— *v.* Hallett 141, 300
Knight *v.* Bowyer 25
——— *v.* Knight 78, 424
——— *v.* Majoribanks 265
——— *v.* Plymouth (Earl of) 237
Knight's Trusts, *Re* 177, 218
Knott *v.* Cottee 79, 166, 216
Knox *v.* Gye 253
Knye *v.* Moore 343
Komlakant Ghosal *v.* Ram Hurree Nund Gramee ... 369, 371
Kooer Golab Sing *v.* Rao Kurun Sing 148
Koonjee Singh *v.* Jankee Singh 105
Koonwar Doorganath Roy *v.* Ram Chunder Sen ... 307, 374, 375
Krishna *v.* Rayappa 51
Krishnaramani Dasi *v.* Ananda Krishna Bose 370
Kudeeram Singh *v.* Sham Singh Poojoory 404
Kulb Ali Hossein *v.* Syf Ali 382, 385
Kullar Singh *v.* Modhoo Dyal Singh 308
Kumara Asima Krishna Deb *v.* Kumara Kumara Krishna Deb, 8, 12, 13, 40, 41, 370
Kunigaratu *v.* Arranganden 159

L.

Lacey, *Ex parte* 252, 257, 258, 259, 290, 291, 327
Lackersteen *v.* Rostan 418, 432
Lake *v.* Lambert 131
Lalla Bunseedhur *v.* Koonwar Bindeseree Dutt Singh ... 307, 311
Lalmoney Dossee *v.* Judoonath Shaw 28
Lalubhai Bapubhai *v.* Mankuvarbai 84, 85, 86
Lambe *v.* Eames 83
——— *v.* Orton 53, 57, 177
Lambert v. Lambert 145
Lamplugh v. Lamplugh 94, 95
Lane *v.* Debenham 170, 335
——— *v.* Dighton 86, 88, 297
Langford *v.* Gascoyne 199, 205, 236
——— *v.* Gowland 360
Langley *v.* Fisher 156
——— *v.* Hawk 340
Langmead's Trusts, *Re* 230
Langstaffe *v.* Fenwick 243
Langston *v.* Ollivant 161
Larking, *Ex parte* 254

Page
Latouche *v.* Dunsany 343
Lauder *v.* Weston 167
Lavender *v.* Blackston 69
Lawless *v.* Shaw 80
Lawrence *v.* Maggs 109
Lear *v.* Leggett 47
Leavers *v.* Clayton 355
Lechmere *v.* Carlisle (Earl of) 320
——— *v.* Clamp 421, 433
——— *v.* Lavie 78, 79
Ledwich, *Re* 284
Lee *v.* Howlett 281
—— *v.* Sankey 185, 215, 240
—— *v.* Young 154, 285
Leedham *v.* Chawner 212, 213, 215, 216
Leeds (Duke of) *v.* Amherst 190, 319
Lees *v.* Sanderson 205
Legg *v.* Mackrell 333, 435
Leifchild's Case 70
Leman *v.* Whitley 90
LeMarchant *v.* LeMarchant 78
Lenaghan *v.* Smith 344
Lench *v.* Lench 295
Lepine *v.* Bean 37
Leslie *v.* Baillie 176
——— *v.* Land Mortgage Bank 28
Lewellin *v.* Cobbold 337
Lewes *v.* Lewes 45
Lewis, *Ex parte* 223
——— *v.* Madocks 83, 295, 297
——— *v.* Matthews 133
——— *v.* Nobbs 141
——— *v.* Rees 68, 72
Ley *v.* Ley 451
Lichfield *v.* Baker 149
Liddard *v.* Liddard 78
Life Association of Scotland *v.* Siddal 191, 192, 220
Lincoln (Countess of) *v.* Newcastle (Duke of) 24
——— *v.* Windsor 245
——— *v.* Wright 203, 217, 322
——— Primitive Methodists' Chapel, *Re* 434
Lister *v.* Hodgson 72
——— *v.* Lister 258, 291
Little, *Re* 439
Livesay *v.* O'Hara 176
Livesey *v.* Harding 282
——— *v.* Livesey 180
Llewellyn's Trust, *Re* 151
Lloyd *v.* Attwood 280
——— *v.* Banks 279
——— *v.* Lloyd 49, 85
——— *v.* Pughe 90, 131
——— *v.* Read 88, 94, 96

Page
Lloyd v. Spillett 83, 85, 96
Local Agents of Zillah Hooghly v. Kishnanund Dundee ... 378
Lokhee Narain Roy Chowdhry v. Kallypuddo Bandopadhya ... 102
Lockyer v. Savage 45
London Gaslight Co. v. Spottiswoode 343
——— Syndicate v. Lord 338
Longley v. Longley 85
Longmore v. Elcum 81
Lonsdale (Earl of) v. Beckett 328
Lord v. Burn 43
——— v. Godfrey 151
Lorenz's Settlement, *Re* 218
Loscombe v. Wintringham 354
Lovat v. Fraser 213
Lovegrove, *Ex parte* 212
Loveridge v. Cooper 277
Low v. Carter 92
Lowe's Settlement, *Re* 281
Lowis v. Rumney 222
Lowry v. Fulton 121, 122, 132, 235
Lowry's Will, *Re* 418
Lowson v. Copeland 137, 138, 218, 314
Luchmi Dai Koori v. Asman Singh 311
Luchmun Dass v. Giridhur Chowdhry 312
Luckhee Narain Chuckerbutty v. Tara Monee Dossee 106
Luff v. Lord 263
Lunham v. Blundell 142
Lupton v. White 318, 319
Lush v. Wilkinson 62, 64
Luteefun v. Bego Jan 303
Luther v. Bianconi 139
Lynn v. Beaver 178
Lyon v. Baker 245
——— v. Home 112
Lyons (Mayor of) v. East India Co.... ... 52, 126, 127, 133, 352
——— v. Advocate-General of Bengal 258, 380
Lyster v. Burroughs 83

M.

Maberly v. Turton 226, 283
Macartney v. Blackwood 290
Macdonald v. Irvine 152
——— v. Richardson 256
Macey v. Shumer 78
Mackay v. Douglas 64
Mackenzie v. Mackenzie 427
Mackett v. Mackett 83
Mackie v. Mackie 151
Mackintosh v. Nobinmoney Dossee 245, 252
Mackintosh's Settlement, *Re* 218
Macleod v. Buchanan 282
Macnab v. Whitbread 78
Macreth v. Symmons 292

Page
Macnamara v. Jones 212, 249
Madhary v. Goburdhun Hulwai 380
Madho Dass v Kamta Dass 379
Magrath v. Morehead 272
Maguire, *Re* 360
Maharanee Brojosoondery Debia v. Ranee Luchmee Koonwaree... 373
——— Shibessouree Debia v. Mothooranath Acharjo ... 374
Mahomed Hamidulla Khan v. Lotful Huq 381, 382, 383
Mahon v. Savage 155
Mahtab Chand v. Mirdad Ali 374
Mainwaring, *Re* 426
Mair, *Re* 434
Maitland v. Bateman 139
Malcolm v. O'Callaghan 212
Malim v. Keighley 78, 79, 283
Malzy v. Edge 121
Mancharji Sorabji Chulla v. Kongseo 104, 292
Mangles v. Dixon 274
Manners v. Furze 340
Manning v. Gill 48, 59, 85
Manning's Trusts, *Re* 436
Manningford v. Toleman 295
Mansell v. Mansell 292, 293
Mansfield v. Shaw 289, 340
Manson v. Baillie 245
Mapp v. Elcock 83, 86
March v Russell 123
Mariott v. Turner 85
Marler v. Tommas 54
Marriot v. Kinnersley 184
Marryat v. Marryat 337
Marsden v. Kent 175
Marsh v. Attorney-General 359
Marshall v. Crutwell 93
——— v. Holloway 246
——— v. Sladden 184
Martin, *Ex parte* 132
——— v. Maugham 47
——— v. Sedgewick 279, 281
Martindale v. Booth 60, 61
Mason v. Morley 319
Massey v. Banner 140, 237
Mathias v. Mathias 294, 295
Mathie v. Edwards 168
Mathura Naikin v. Esu Naikin 48
Matthew v. Hanbury 48
Matthews, *Re* 434
——— v. Brise 141
Matthison v. Clarke 243, 251, 255
Maunder v. Lloyd 28
Maw v. Pearson 109, 240
May v. May 35
Mayer v. Murray 187, 188

Page
Maynard's Settlement Trusts, *Re* 426, 435
McCulloch *v.* Bland 54
——— *v.* McCulloch 80
McCormick *v.* Grogan 80
McDonald *v.* Hanson 170
McDonell *v.* White 158
McDonnell *v.* Hesilrige 67, 71
McMurray *v.* Spicer 421
Mead *v.* Orrery (Lord) 292
Meaghan, *Re* 48
Medworth *v.* Pope 36
Meek *v.* Kettlewell 54, 56, 57, 67
Meggison *v.* Moore 78
Megji Hansraj *v.* Ramji Joita 277, 280
Megson *v.* Hindle 36
Meinertzhagen *v.* Davis 129, 328, 330
Mendes *v.* Guedalla 140
Meredith *v.* Heneage 78, 80
Merlin *v.* Blagrave 178, 217
Mertins *v.* Jolliffe 293, 294
Messeena *v.* Carr 240
Messenger *v.* Andrews 79
Metcalfe, *Re* 118, 119
——— *v.* Pulvertoft 60
Meux *v.* Bell 211, 277, 280
M'Fadden *v.* Jenkyns 52, 57, 242, 287
M'Gachen *v.* Dew 322
M'Hardy *v.* Hitchcock 336, 337
Michel's Trusts, *Re* 353
Middleton *v.* Dodswell 340
——— *v.* Reay 287
——— *v.* Spicer 251
Midland Bank *v.* Chambers 76
Mildmay's Case 70
Miles *v.* Durnford 48
Millard *v.* Eyre 284
Miller *v.* Priddon 328
——— *v.* Race 295
Milligan *v.* Mitchell 223, 288
Mills *v.* Cobb 451
——— *v.* Farmer 358
——— *v.* Osborne 138, 161
Milroy *v.* Lord 53, 55, 56, 58
Minet *v.* Leman 154
Minors *v.* Battison 232
Mir Nur Ali *v.* Mafidah 381
Mitchelson *v.* Piper 232
Mitford, *Ex parte* 322
——— *v.* Reynolds 354, 362
Mitta Kunth Audhicarry *v.* Neerunjun Audhicarry 377
M'Kay's Case 255
M'Kenna *v.* Eager 122
Mockett's Will, *Re* 218

Page
Moggridge *v.* Thackwell 282, 357
Mohabeer Kooer *v.* Joobha Singh 307
Mohesh Lall *v.* Busunt Kumaree 222
Mohun *v.* Mohun 346, 347
——— Doss, *In re* 380
Mohunt Burm Suroop Dass *v.* Khashee Jha 375
——— Gopal Dass *v.* Mohunt Kirparam Dass 378
——— Rumun Dass *v.* Mohunt Ashbul Dass 378
Molyneux, *In re* 433
Monckton *v.* Braddell 177
Moneypenny *v.* Dering 38
Montefiore *v.* Beheens 47
——— *v.* Brown 73
——— *v.* Enthoven 47
Montford (Lord) *v.* Lord Cadogan 120, 123, 189
Montgomery *v.* Johnson 121
Montmorency *v.* Devereux... 261
Moohummud Sadik *v.* Moohummud Ali ... 381, 386, 387, 389
Moonshee Buzloor Ruheem *v.* Shumsoonissa Begum ... 14, 98, 180
——— Golam Ali *v.* M. S. Sowlutoonissa Bibee 387
Moore *v.* Blake 343
——— *v.* Crofton 69
——— *v.* Darton 53, 58
——— *v.* Frowd 243, 244, 248
——— *v.* Moore 55
——— *v.* Morris 344
——— *v.* Prance 114
Moorecroft *v.* Dowding 235
Morewood *v.* South Yorkshire Railway Co. 65
Morgan *v.* Malleson 58
——— *v.* Morgan 151, 152
——— *v.* Slaughter 449
——— *v.* Stephens 184
Morice *v.* The Bishop of Durham 355
Morison *v.* Morison 215, 246, 255
Morley *v.* Morley 140
Mornington, *Ex parte* 433
Morris *v.* Cannan 277
——— *v.* Livie 274, 323, 324
Morrison *v.* Morrison 212
Morse *v.* Royal 257, 258, 261, 262, 263
Mortimer *v* Davies 88
Mortlock *v.* Buller 169
Morvah Mining Co., *In re* 255
Mosely *v.* Ward 167
Moses *v.* Levi 205
Moulvee Abdoolla *v.* M. S. Rajesri Dossea 385
——— *v.* Ramzoo Dye 385, 386
Moulvie Sayyud Uzhar Ali *v.* M. S. Bebee Ultaf Fatima ... 100
——— Syud *v.* M. S. Bibee 98
Moyle *v.* Moyle 132, 142
M'Turk, *Ex parte* 279
Muckleston *v.* Brown 48

Page
Mucklow *v.* Fuller 120, 121, 201, 203
Muddun Gopal Lall *v.* M. S. Gowrunbutty 309
——— Thakoor *v.* Kuntoo Lall 311, 312
Muggeridge's Trusts, *Re* 46, 219
Muhammud Kasim *v.* Muhammud Alum Kiyamuddeen ... 389.
Mulhallen *v.* Macum 107
Mulvany *v.* Dillon 107, 108, 109, 265
Mumma *v.* Mumma 94
Munch *v.* Cockerell 184, 189
Murless *v.* Franklin 90, 94, 95
Murphy, *In re* 48
——— *v.* O'Shea 261, 265
Murray, *Re* 66
——— *v.* Palmer 261
——— *v.* Pinkett 281
Musadee Mahomed Cazum Sherazee *v.* Meerza Ally Mahomed Shoostry 105
M. S. Ameerun *v.* M. S. Hyatun 303
——— Bibee *v.* Fuzl Hossein 97, 102
——— Bhowna *v.* Roop Kishore 311
——— Buhuns Kowur *v.* Lalla Buhoree Lall 102
——— Bukshun *v.* M. S. Doolhin 307
——— Hyatee Khanum *v.* M. S. Koolsum Khanum ... 381, 388
——— Jai Bansi Kunwar *v.* Chattar Dari 335, 379
——— Kishnee *v.* Khealee Ram 146
——— Kooldeep Kooer *v.* Runjeet Singh 311
——— Lodhoomona Dassee *v.* Gunnesh Chunder Dutt 147
——— Maharani *v.* Nund Lall Misser 147
——— Nowruttun Koer *v.* Baboo Gouree Dutt Singh 306
——— Qadira *v.* Shah Kubeer-ood-deen Ahmed ... 384, 385
——— Rookho *v.* Madho Dass 51
——— Sham Soondur Kooer *v.* M. S. Jumna Kooer 311
——— Shurfoonissa *v.* M. S. Koolsum 382
——— Suraj Bansi Kunwar *v.* Mahiput Sing 147
——— Thukrain Sookraj Koowar *v.* The Government 104
Muthoora Koonwaree *v.* Bootun Singh 307
Muzhurool Huq *v.* Pubraj Ditarey Mohapattur ... 381, 382, 385
Myler *v.* Fitzpatrick 109, 215, 240

N.

Nabob Amiruddaula Muhammad *v.* Nateri Srinivasa Charlu ... 41
Naikram Lall *v.* Soorujbuns Sahee 148
Nanney *v.* Williams 59, 71, 110
Naryan *v.* Chintaman 374
Nash *v.* Smith 86
Natal Investment Co., *Re* 274
Neale *v.* Davis 156
——— *v.* Day 64
Needham, *Re* 120
Nelson *v.* Bridport 50
——— *v.* Duncombe 221
——— *v.* Stocker 180
Nepean *v.* Doe 177

Page
Nesbitt v. Tredennick 109
New v. Bonaker 360
—— v. Jones 245, 249
Newcastle (Corporation of, v. Attorney-General 68
Newill v. Newill 82
Newland v. Attorney-General 354
Newport v. Bury 246
New Sombrero Phosphate Co. v. Erlanger 255
Newsome v. Flowers 156
Newton v. Askew 59, 68, 158
——— v. Newton 281
Nicholson v. Smith 328
——— v. Tutin 73, 76, 243
——— v. Wordsworth 133
——— v. Wright 328
Nickisson v. Cockell 155
Nidhee Singh v. Bissonath Dass 104
Nightingale v. Goulburn 354
Nitai Charan Pyne v. S. M. Ganga Dasi 41
Noad v. Backhouse 340
Noble v. Brett 151
——— v. Meymott 133, 328, 344
Nogender Chunder Ghose v. Greender Chunder Ghose... 86, 297
Norcutt v. Dodd 60
Norfolk (Duke of), *Re* 38
——— v. Brown 90
——— v. Howard 38
Norrington, *In re* 175, 184
Norris, *Ex parte* 177
——— v. Chambres 31, 32
——— v. Wright 167
North v. Gurney 278
——— British Insurance Co. v. Hallett 278
Northen v. Carnegie 83, 86
Norton v. Relly 112
Norway v. Norway 133, 347
Nottidge v. Prince 112
Nowab Azimut Ali Khan v. Hurdwaree Mull 101
Nundlall Baboo v. Bolakee Bebee 146, 147
Nundun Lal v. Tayler 104
Nunn v. Wilson 59
Nuthoo Lall v. Buddree Pershad 114

O.

Oakes v. Strachey 149
Obhoy Churn Ghuttuck v. Trelochun Chatterjee 106
——— Mookerjee v. Punchanun Ghose 98
O'Brien v. O'Brien 168
Occleston v. Fullalove 36
Oglander v. Oglander 285
Ogle, *Ex parte* 137, 178, 222
O'Herlihy v. Hedges 250
Oldham v. Hand 114

Page
Oldham v Oldham 45
Oliver v. Court 168, 169, 171, 260, 290
Olliver v. King 65
Ommaney v. Butcher 355
Oomed Rai v. Heera Lall 309
Ord v. Noel 168, 169, 222, 223
Ord's Trust, *Re* 419
O'Reilly v. Alderson 284
Ormsby, *In re* 212, 243
Orr v. Newton 139
Osborn's Mortgage Trusts, *Re* 422
Osborne, ——— v. 331
Ottley v. Browne 48
——— v. Gilbey 158
Overton v. Banister 180
Owen v. Williams 109
Oxley, *Ex parte* 45

P.

Padbury v. Clark 321
Paddon v. Richardson 133, 161
Page v. Cooper 170
——— v. Horne 115
——— v. Leapingwell 85, 86
——— v. Way 44
Paget v. Ede 31
Palairet v. Carew 169, 269, 330
Palaniyappa Chetti v. Arumugam Chetti 102
Palmer v. Simmonds 78, 79
——— v. Young 108
Panchcowrie Mull v. Chumroo Lall 364, 403
Papillon v. Voice 20, 23
Param Singh v Lalji Mul 107
Pareyasami v. Saluckai Tevar 311
Parker v. Bloxam 251
——— v. Brooke 109, 260
——— v. Clarke 324
——— v. M'Kenna 254
Parkes' Trust, *Re* 436
Parkes v. White 260
Parley, *Re* 434
Parnell v. Hingston 53, 58
Parry v. Warrington 173
Parsons v. Baker 78
——— v. Hayward 253
Partington v. Reynolds 188
Passingham v. Sherborn 132
Patch v. Shore 54
Paterson v. Murphy 58, 59, 71
Pattenden v. Hobson 174
Paul v. Compton 78
Pawlett v. The Attorney-General 33
Pawson v. Brown 336

Page
Payne v. Barker 269
——— v. Compton 293
——— v. Evens 158
——— v. Little 347
Peacham v. Daw 339
Peacock, *Re* 429, 430
Peake v. Ledger 344
Pearce v. Gardner 174
——— v. Pearce 330
Pearse v. Green 157, 158
Pearson, *Re* 435
——— v. Amicable Assurance Co. 56
——— v. Benson 289
——— v. Lane 272
——— v Pearson 221
Peat v. Lane 198
Pechel v. Fowler 168, 288
Peckham v. Taylor 52
Peddamuthulaty v. Temma Reddy 87, 118
Pedder v. Mosely 56
Pedder's Settlement 321
Peers v. Ceeley 213
Peet Koonwar v. Chatter Dharee Singh 389
Pelham v. Anderson 353
Pell v. De Winton 221
Penfold v. Bouch 86, 269
——— v. Mould 56
Penn v. Baltimore (Lord) 29
Pennell v. Deffell 141, 297, 300
Pepper v. Tuckey 285
Peppercorn v. Wayman 134
Perrot v. Perrot 143
Perry, *In the Goods of* 121
——— v. Knott 343, 344
Peter v. Nicholls 67
Peterson v. Peterson 181
Petre v. Espinasse 73
Peyton's Settlement, *Re* 225, 427
Phate Saheb Bibi v. Damodar Premji 381, 389
Phelps, *Ex parte* 284
Phene v. Gillan 216
Phene's Trusts, *In re* 177
Philips v. Bridges 18, 273
——— v. Philips 84, 180, 198
Phillips v. Munnings 123
Phillpotts v. Phillpotts 48
Phillipson v. Gatty 167, 190
——— v. Kerry 72
Phipps v. Lovegrove 176
Piarey Lall v. Saliga 305
Pickard v. Anderson 162
Pickering v. Pickering 150, 152
Pickstock v. Lyster 62

Page
Pierce v. Scott 231
Piercy v. Roberts 42
Pierson v. Garnett 78, 283
Pieschell v. Paris 359
Piety v. Stace 167, 313
Pilkington v. Boughey 78
Pince v. Beattie 246
Pink v. DeThuisey 154
Pocock v. Attorney-General 357
——— v. Reddington 161, 167, 347
Pole v. Pole 94
Pollard v. Doyle 245
Pollexfen v. Moore 133
Pomfret (Lord) v. Lord Windsor 155
Poole v. Odling 92
——— v. Pass 212
Pooley v. Quilter 252
Port Canning Co., *Re* 246, 255
Portarlington (Lord) v. Soulby 32
Porter v. Watts 332
Porter's Trusts, *Re* 434, 435
Portlock v. Gardner 109
Portsmouth (Earl of) v. Fellows 285
Pott v. Todhunter 60, 70
Potter v. Chapman 242
Potts v. Potts 145
Powell, *In re* 284
——— v. Attorney-General 353
——— v. Evans 138, 198
——— v. Glover 254
——— v. Matthews 420
Powys v. Blagrave 143
——— v. Mansfield 91
Prankard v. Prankard 87
Praushankar v. Pranath Mahanand 377
Prasannamayi Dasi v. Kadumbini Dasi 27
Pratt v. Barker 117
——— v. Matthew 36
Prendergast v. Prendergast... 242
Prevost v. Clarke 78
Price v. Blackmore 294, 295, 297
——— v. Byrn 261
——— v. Loaden 216
Priddy v. Rose 274, 322, 323, 325
Pride v. Fooks 166, 184
Prideaux v. Londale 72
Primrose, *Re* 178, 442
Prince v. Hine 226, 227
Prison Charities, *In re* 359
Proby v. Proby 125
Proctor v. Robinson 119
Promotho Dossee v. Radhika Persaud Dutt 40, 41, 370
Prosonno Kumari Debya v. Golab Chand Baboo 374

Page
Proudfoot *v.* Hume 338
Prowse *v.* Spurgin 180
Pryce, *In re* 278
Pugh *v.* Vaughan 143, 269
Pullen *v.* Ramalinga 105
Pultney *v.* Darlington 321
Purappa Vanalingam Chetti *v.* Nallasivan Chetti 14
Purikheet Sahoo *v.* Radha Kishen Sahoo 106
Purmessur Ojha *v.* M. S. Goolbee 308
Pushong *v.* Munia Halwani 111, 114

Q.

Queen's College, *Re* 367

R.

Raby *v.* Ridehalgh 162, 217, 322
Rackhaldoss Moduck *v.* Bindoo Bashinee Debia 103
Rackham *v.* Siddal 123
Radhabai Kom Chimnaji Sali *v.* Chimnaji bin Ramji Sali ... 364
Radha Bullub Chand *v.* Juggut Chunder Chowdhree 375
——— ——— Tagore *v.* Gopee Mohun Tagore 369
——— Mohan Dhar *v.* Ram Das Dey 147
Rai Charan Pal *v.* Pyari Moni Dasi 148
Rajah of Kovilagom *v.* Kottayath 235
——— Muttu Ramalinga Setupati *v.* Perianayagum Pillai 379, 380
——— Rajnarain Roy *v.* Jugguunath Pershad Mullick 105
——— Valad Shivapa *v.* Krishna Chat 364
——— Vurmah Valia *v.* Ravi Vurmah Mutha ... 375, 377
Rajender Dutt *v.* Sham Chand Mitter 40, 370
Rajlukhee Dabea *v.* Gokool Chunder Chowdhry 148
Rajmohun Bose *v.* The East Indian Railway Co. 28
Rakestraw *v.* Brewer 109
Rakhaldas Madak *v.* Madhu Sudan Madak 268, 305
Ram Chunder Ghosal *v.* Juggut Monmohiney Dabee 222
Ram Coomar Paul *v.* Jogender Nath Paul 373, 374
Ramanugra Narain *v.* Mahasundar Kunwar 105
Ramiengar *v.* Gnanasmbanda Pandarasanuada 399
Ramkissen Pajoshee Mahapatur *v.* Hurry Kissen Mahapatur ... 114
Ram Lal Thakursidas *v.* Lakhmi Chand Muniram ... 169, 253
Ram Lall Dut *v.* Kishen Chunder Banerjee 106
——— ——— Mookerjee *v.* The Secretary of State for India ... 376
Ram Narain Singh *v.* Ramoon Panrey 380
Ram Sahoy Singh *v.* Mohabeer Pershad 311
Ramsden *v.* Hylton 69
Ram Soonder Sandial *v.* Rajah Anund Nath Roy 105
——— ——— Thakoor *v.* Taruck Chunder Turkoruttun ... 377
Ram Tonoo Mullick *v.* Ramgopal Mullick 369
Randall *v.* Errington 257, 258, 259, 261, 262, 289, 291
Randell's Will, *Re* 427
Rani Kattama Natchiar *v.* Bothagurusami Tevar 294
Raphael *v.* Boehm 166, 167, 317, 318, 348
Ratcliffe *v.* Graves 313
——— *v.* Winch 222

Page
Raworth v. Parker 76
Ray v. Adams 78
Read v. Truelove 234
Reasut Ali v. Abbott 390
Redington v. Redington 94
Reed v. O'Brien 344
Reese River Co. v. Atwell 61, 64, 65
Reeve v. Parkins 288
Reeves v. Baker 80
Reg. v. Norfolk Commissioners of Sewers 214
Rehden v. Wesley 141, 142, 209
Reid v. Reid 328
Remnant v. Hood 178
Rennie v. Gunga Narain Chowdry 103
——— v. Young 190
Renshaw's Trusts, *Re* 434
Reotee Singh v. Ramjeet 311
Retoo Raj Pandey v. Lalljee Pandey 148
Revett v. Harvey 113
Rex v. Newman 354
—— v. Portington 35
Reynault, *Re* 435
Reynolds, *Ex parte* 284, 291
Rhodes v. Bates 117, 118
Richards v. Delbridge 53, 54, 55
——— v. Perkins 340
Richardson v. Bank of England 337, 339
——— v. Evans 450
——— v. Larpent 345
——— v. Richardson 55, 57
——— v. Smallwood 62, 64
——— v. Younge 241
Rickards v. Gledstanes 280
Rider v. Kidder 60, 87, 88, 90
Ridgway v. Newstead 181
Rigley, *Ex parte* 240
Riky v. Kemmis 201
Rippon v. Norton 44, 45
Rives v. Rives 431
Robarts, ——— v. 331
Roberdeau v. Rous 29, 31
Roberts v. Gordon 122, 321
——— v. Tunstall 261
Robertson v. Armstrong 171, 184, 240
Robinson v. Litton 143
——— v. Lowater 230
——— v. M'Donell 65
——— v. Pett 132, 243. 247, 252
——— v. Ridley 290, 291
——— v. Robinson 165, 166
——— v. Smith 78
Roche, *In re* 329
Rochford v. Hackman 46, 274

Page
Rocke v. Hart 347
——— v. Rocke 272
Rogers v. Rogers 84, 338
——— v. Skillicorne 230
Rohee Lall v. Dindyal Lall 102
Rolland v. Hart 280
Rook v Warth 321
Roop Narain Singh v. Gugadhur Pershad Narain 293
——————— v. Junko Bye 386, 403
Roper v. Radcliffe 83
Ross v. Ross 41, 236
Rossiter v. Trafalgar Life Assurance Co. 222
Rothwell v. Rothwell 339
Roushun Khatoon Chowdrain v. The Collector of Mymensingh . 105
Routh v. Howall 140
Rowe v. Rowe 151
Rowland v. Morgan 217
——— v. Witherden 163, 167
Rowley v. Adams 137, 424, 438
Roy v. Gibbon 338, 339
Rujabai v. Ismail Ahmed 59, 114, 117
Ruknadawla Nowab Ahmed Ali Khan v. Hurdwari Mull 98, 100, 102
Russell, *Ex parte* 427
——— v. Jackson 79
——— v. Kellett 353, 357, 360
Ryal v. Ryal 86, 88
Rycroft v. Christy 57, 68
Ryder v. Bickerton 160

S.

Sabapathi v. Subraya 404
Sabin v. Heap 231
Sacaram v. Laxmabai 308
Sackville West v. Holmesdale (Viscount) 23
Sadd, *Re* 216
Sadler v. Hobbs 205
Sahebzada Singh v. Gundaree Roy 109
Sale v. Moore 78, 79
Salter v. Cavanagh 84
Saltmarsh v. Barrett 178
Salusbury v. Bagott 293, 294
——— v. Denton 283, 361
Salway v. Salway 141
Sampayo v. Gould 160
Sanders v. Homer 431
Sanderson v. Walker 258, 264, 291, 347
Sanderson's Trust, *Re* 42, 242
Sandon v. Hooper 215
Sands v. Nagee 328
Sankarappa v. Kamayya 105
Saravana v. Muttayi 308
Sarkies v. S. M Brosonomoyee Dossee ... 126, 127, 133, 352
Saroda Pershad Chattopadhya v. Brojo Nath Bhuttacharjee ... 187

Page
Saroda Sundari Debi *v.* Gobind Mani 177
Satoor *v.* Satoor 337
Saumarez, *Re* 439
Saunders *v.* Dehew 292
——— *v.* Neville 270
——— *v.* Saunders 346
——— *v.* Vautier 272
——— *v.* Watson 61
Savage *v* Robertson 37
Sayre *v.* Hughes 91, 92
Scales *v.* Baker 303
Scawin *v* Scawin 95
Score *v.* Ford 338, 339
Scott *v.* Becher 289, 340
—— *v.* Davis 261
—— *v.* Key 79, 81
—— *v.* Nesbitt 29, 261
—— *v.* Scott 70
Scrope *v.* Offley 117
Scroope *v.* Scroope 94
Sculthorp *v.* Burgess 90
Sculthorpe *v.* Tipper 175, 184
Seagram *v.* Knight 144, 221
Sealy *v.* Stawell 295
Searle *v.* Law 55
Seely *v.* Jago 320, 321
Segrave *v.* Kirwan 110
Selby *v.* Bowie 169, 173
Selyard *v.* Harris 343
Seshayyangar *v.* Seshayyangar 380
Sewell's Estate *In re* 15
Shafto *v.* Adams 71
Shah Gulam Rahumtulla Sahib *v.* Mahommed Akbar Sahib 388, 389
—— Moheeuddeen Ahmed *v.* Elahee Buksh 388
—— Wajed Hossein *v.* Baboo Nankoo Singh... 311
Shahzadi Hajra Begum *v.* Khaja Hossein Ali Khan 385
Shakeshaft, *Ex parte* 167, 168
Shales *v.* Shales 95
Sham Kissore Shaw *v.* Cowie 60
Shama Soonduree Chowdhrain *v.* Jumoona Chowdhrain 147, 148
Sharp *v.* Cosserat 45
—— *v.* Leach 111, 118
—— *v.* Sharp 328
Sharpe *v.* Foy 280
Shaw *v.* Borrer 220
—— *v.* Lawless 216
Shaw's Trust, *Re* 144
Shee *v.* Hale 47
Sheffield *v.* Buckinghamshire (Duchess of) 32
Sheik Abdool Khalek *v.* Poran Bibee 388
Shelmerdine, *Re* 434
Sheo Pershad Singh *v.* M. S. Soorj Bunsee Kooer 311
Sheoraj Kooer *v.* Nukchedee Lall 307, 308, 311

Page
Sheoram Ghose *v.* Dataram Ghose 92
Shepherd *v.* Mouls 165
——— *v.* Nottige 78
Sheppard's Will, *Re* 438
Sheridan *v.* Joyce 176
Sheriff *v.* Axe 243, 254
Sherwood, *In re* 244
Shewen *v.* Vanderhorst 232
Shipbrook (Lord) *v.* Hinchinbrooke (Lord) ... 199, 200, 205
Shoojat Ali *v.* Zumeerooddeen 386
Shovelton *v.* Shovelton 78, 82, 346
Shrewsbury *v.* Hornby 353
Shurbo Narain Singh *v.* Ally Buksh Shah 384
Sidmouth *v.* Sidmouth 88, 94, 95
Siggers *v.* Evans 73, 76
Sillick *v.* Booth 177
Simes *v.* Eyre 343
Simon *v.* Barber 359
Simpson *v.* Chapman 256
Sirdar Sainey *v.* Piran Singh 51
Sisson *v.* Shaw 226
Sitapershad *v.* Thakur Dass 377, 378
Skarf *v.* Soulby 63, 64
Skidmore *v.* Bradford 94
Skingley, *Re* 144
Skitter's Mortgage, *Re* 421
Skottowe *v.* Williams 118, 119
Skynner *v.* Pelichet 430
Slade *v.* Rigg 344
Slaney *v.* Watney 133, 248
Sleeman *v.* Wilson 254
Sleight *v.* Lawson 187
Sloane *v.* Cadogan 56
Sloman *v.* The Bank of England 179
Sloper, *Re* 438
——— *v.* Cottrell 56
Sluysken *v.* Hunter 72
Smart, *Ex parte* 280
——— *v.* Bradstock 345
Smirthwaite's Trusts, *Re* 434
Smith, *Ex parte* 241, 261
——— *v.* Baker 87
——— *v.* Bolden 176
——— *v.* Dresser 212
——— *v.* Garland 67
——— *v.* Guyon 231
——— *v.* Kay 111
——— *v.* Lyne 59, 71
——— *v.* Smith 123, 131, 280, 323, 340, 437, 458
——— *v.* Warde 95
——— *v.* Wheeler 268
——— *v.* Willis 212
Smyth's Settlement, *Re* 437

Page
Sneesby *v.* Thorne 169
Snowdon *v.* Dales 41, 42, 274
Soar *v.* Foster 88, 91
Somerset *v.* Cox 280
Sonatun Bysack *v.* S. M. Juggut Soondree Dossee ... 369, 374
Sonley *v.* The Clockmakers Co. 282
Soodheekeena Chowdhrain *v* Gopee Mohun Sein 60
Sookram Doss Mohunt *v.* Nund Kishore Doss Mohunt... ... 405
Soorendro Pershad Dobey *v.* Nundun Misser 307
Soorjeemoney Dossee *v.* Denobundoo Mullick 35
Soudaminey Dossee *v.* Jogesh Chunder Dutt 40
Soulby, *Re* 455
Sowarsby *v.* Lacey 231
Sparrow, *Re* 435
Spawforth's Settlement, *Re*... 427
Spirett *v.* Willows 63, 64
Spring *v* Pride 262, 263
Springett *v.* Dashwood 158
Sreeman Chunder Dey *v.* Gopaul Chunder Chuckerbutty 101, 102
S. M. Bramamayi Dasi *v.* Joges Chunder Dutt 40
——- Debia Chowdhrani *v.* Bimola Soonduree Debia 107
——- Jagadamba Dasi *v.* S. M. Padamani Dasi 27
——- Kamini Debi *v.* Ramlochan Sirkar 258
——- Krishnaramani Dasi *v.* Ananda Krishna Bose ... 8, 12, 40
——- Sukhimani Dasi *v.* Mahendranath Dutt 105
Sreenath Roy *v.* Cally Doss Ghose 27
Stacey *v.* Elph 122, 133, 258
Stafford *v.* Fiddon 314
——- *v.* Stafford 190
Standen *v.* Bullock 69
Stanes *v.* Parker 247
Stanford *v.* Roberts 211
Staniland *v.* Staniland 81
Stanley *v.* Stanley 272
——- *v.* Lennard 21
Stansfield *v.* Habergham 143
Stanton *v.* Hall 45
Stapleton *v.* Stapleton 53, 58
Stephens *v.* James 45
——-- *v.* Olive 64
——-- *v.* Venables 280, 325
Stevens *v.* Austen 169
Stewart, *Ex parte* 279
——-, *Re* 420
——- *v.* Hoare 212
Stickney *v.* Sewell 163, 266
Stikeman *v.* Dawson 128
Stileman *v.* Ashdown 94
Stilwell *v.* Ashley 421
Stocken *v.* Dawson 244
Stokes' Trusts, *Re* 331, 405
Stokoe *v.* Cowan 60, 62
Stone *v.* Godfrey 156

Page
Stone v. Lidderdale 35
——— v. Stone 95, 137
Stonehouse v. Evelyn 85
Stones v. Rowton 328
Stratford v. Twynam 265
Stretz's Trusts, *Re* 47
Strong v. Strong 61
Stroud v. Gwyer 236
Stroud's Trusts, *Re* 428
Stroughill v. Anstey 170, 174, 230
Stuart v. Stuart 162
Stubbs v. Sargon 86
Stump v. Gaby 118
Styles v. Guy ... 121, 138, 139, 160, 190, 202, 205
Suboodra Beebee v. Bikromadit Singh 107, 156
Sugden v. Crossland 255, 330
Suraj Bunsi Koer v. Sheo Persad Singh 312
Sutcliffe v. Richardson 82
Sutherland v. Cooke 149
Suttaprosunno Ghosal v. Rakhalmoney Dossee 53
Sutton v. Jones 255
——— v. Wilders 140, 179
Swale v. Swale 341
Swayne v. Swayne 281
Swinfen v. Swinfen 141, 142
Syed Amin Sahib v. Ibram Sahib 403
—— Khodabux Khan v. M. S. Oomutul Fatima 181
Sykes v. Hastings 255
——— v. Sykes 38
Symes v. Hughes 19, 48, 85
Syud Asheerooddeen v. M. S. Drobo Moyee 387
——— Bazayet Hossein v. Dooli Chand 312
——— Imdad Hossein v. Syud Afzul Hossein 387
——— Imdad Hossein v. Mahomed Ali Khan 404
——— Tasouwar Ali v. Koonj Beharee Lall 307, 308, 311

T.

Tabor v. Brookes 154
Tahboonissa Bibee v. Koomar Sham Kishore Roy 374
Tait v. Jenkins 341
Talbot v. Hope Scott 340
——— v. Marshfield 242, 339
——— v. Radnor 133
Tandavaraya Mudali v. Valli Ammal 311
Tanner v. Elworthy 108
Tara Monee Debia v. Shibnath Tulapattur 102
—— Soonduree Debea v. Oojul Monee Dossee 104
Tarragona 125
Tate v. Leithead 53
Tatham v. Vernon 20
Taylor, *Re* 434
——— v. Allen 289, 340
——— v. Cartwright 192

Page
Taylor v. Coenen 62
——— v. George 78
——— v. Glanville 217, 269, 270, 347
——— v. Haygarth 157, 256
——— v. Millington 136
——— v. Plummer 294, 296
——— v. Tabrum 225
——— v. Taylor 95
Teague's Settlement, *Re* 40
Tebbs v. Carpenter 137, 138, 193, 313, 314, 318, 348
Tempest, *Ex parte* 66
———, *In re* 286
——— v. Camoys (Lord) 155
Templer's Trusts, *Re* 422
Tennant v. Trenchard 264
Terrell v. Matthews 198, 204
Thacker v. Key 242
Thakur Shere Bahadur v. Thakurain Dariao Kuar 127
Thomas v. Dering 154
——— v. Walker 436
Thompson v. Blackstone 169
——— v. Clive 158
——— v. Corby 353
——— v. Eastwood 191, 192
——— v. Finch 72, 191, 195, 239
——— v. Harrison 192
——— v. Linch 188
——— v. Simpson 294
——— v. Tomkins 279
——— v. Thompson 354
——— v. Webster 62, 63, 70
——— v. Whitmore 72
Thomson v. Shakespeare 49, 355
Thorby v. Yeats 269
Thornber v. Wilson 353
Thorndike v. Hunt 293
Thornton v. Howe 48, 353
Thorp v. Owen 56, 80, 81
Thorpe v. Jackson 344
Thrupp v. Collett 354
Tibbits v. Tibbits 78
Tickner v. Smith 314
Tidd v. Lister 268, 340
Tiluk Chand v Jitamal 105
Timson v. Ramsbottom 280
Tipping v Eckersley 145
Titley v. Wolstenholme 238
Todd v. Moorhouse 215
——— v. Wilson 247
Toker v. Toker 71, 111, 117
Toller v. Carteret 29, 31
Tomson v. Brown 72
——— v. Judge 114
Toondun Singh v. Pokh Narain Singh 103

Page
Toplis v. Hurrell 205
Townend v. Toker 60, 67, 69, 70
——— v. Townend 251, 256
——— v. Westacott 64
Townley v. Bedwell 354
——— v. Sherborne 193, 199, 240
Townsend v. Barber 205
——— v. Early 47
——— v. Townsend 303
——— v. Westacott 92
Townson v. Tickell 133
Trafford v. Boehm 161, 189, 321
Travis v Illingworth 213, 328
Treepoora Soondery Dossee v Debendronath Tagore 28
Tregonwell v. Sydenham 85, 86
Trench v. Harrison 294, 295, 303
Trevelyan v. Charter 290
Treves v. Townshend 313
Trustees of the British Museum v. White 350
Trutch v. Lamprell 237
Tryon, *Re* 134
Tucker v. Burrow ... .91, 94
——— v. Horneman 217
Tull v. Parlett 70
Tunstall's Will, *Re* 435, 436
Turner v. Buck 175
——— v. Collins 111, 119
——— v. Corney 235
——— v. Frampton 178
——— v. Harvey 169
——— v. Maule 177
——— v. Ogden 353
——— v. Turner 313, 314
Twopeny v. Peyton 42
Twyne's Case 61
Tylee v. Tylee 340

U.

Underwood v. Stevens 198, 199, 201, 205
Uniacke, *Re* 120
Union Bank of Manchester, *Ex parte* 278
Urch v Walker 121, 122, 133, 177
Uvedale v. Ettrick 285

V.

Van v. Barnett 321
Vance v. Vance 92, 94, 208
Vandenberg v. Palmer 57, 58
Van Sandau v. Moore 346
Vaughan v. Vanderstegen 217
Vaughton v. Noble 252, 322
Venkatabalakrishna Chettiyar v. Kaliya Naramaiyangar ... 399
Venkataramayyan v. Venkatasubramania Dikshatar 311

Page
Venkatasa Naidu v. Sadagopasamy Iyer 405
——— — - Nayudu v. Shrivan Shatgagopa Swami 14
Vezey v. Jamson 355
Vickers v. Scott 173
Vigrass v. Binfield 339
Villiers v. Beaumont 65, 111
Viner v Vaughan 143
Viney v. Chaplin 171
Vital Vishva Nath Prabhu v. Ram Chandra Sadasiv Kirkire ... 52
Voyle v Hughes 56
Vyse v. Foster 251, 315, 318, 320

W.

Wade v. Hopkinson 426
——— v. Paget 18
Wainford v. Heyle 131
Waite v. Littlewood 226
Wake v. Wake 431
Wakeford, *Re* 418
Waldo v. Coley 356
——— v. Waldo 220
Walker, *Re* 244, 419
——— v. Shore 174
——— v. Smallwood 168, 232
——— v. Smith 114
——— v. Symonds 139, 157, 160, 195, 199, 240
——— v. Walker 163, 266
Walker's Mortgage Trusts, *Re* 421
Wallace v. Anderson 44
Walley v. Walley 109, 344
Walsh v. Gladstone 353
Walwyn v. Coutts 73, 74, 75
Walsham v Stainton 217, 322
Walters v. Woodbridge 214
Warburton v. Hill 281, 282
——— ——— v. Sandys 335
Ward v. Audland 54
——— v. Hipwell 241
——— v. Shallett 69
——— v. Ward 220
Ware v. Cann 41
——— v. Gardner 64
Warman v Seaman 90
Warren v. Rudall 133
Warrenche v. Foster 418
Warriner v. Rogers 53, 58
Wasik Ali Khan v. The Government 402
Waterhouse v. Standfield 32
Watkins v. Cheek 231
Watson v. Hayes 85
——— v. King 457
——— v. Knight 76
——— v. Parker 54

Page
Watson v. Pearson 335
——— v. Row 214
——— v. Toone 257, 261, 265, 289, 290
Watts, *Ex parte* 216
——— v. Girdlestone 160
Watts' Settlement, *Re* 330
Way, *Re* 53, 56, 58, 72
Weale v. Ollive 55, 56
Webb v. Shaftesbury (Earl of) 214, 223, 247, 288
——— v. Ledsam 230
——— v. Rorke 260
——— v. Webb 346
——— v. Wools 80
Webster v. Webster 280
Wedderburn v. Wedderburn 244, 251, 253
Wedgwood v. Adams 178
Weller v Ker 155
Wellesley v Wellesley 83
West v. Dobb 450
——— v. Jones 171
——— v. Shuttleworth 350
Westbrooke, *In re* 212, 244
Westcott v. Culliford 178
Westhead v. Sale 441
Westley v. Clarke 194
Westover v. Chapman 161, 266
Wetherell v. Wilson 80, 82
Wheatley v. Purr 53, 57, 58
Wheeler v. Smith 81, 87
Wheldale v. Partridge 321
Whelpdale v. Cookson 258, 264
Whichcote v. Lawrence 257, 258, 261, 262
Whicker v. Hume 354
Whitcomb v. Minchin 260
White, *Re* 420, 428
——— v. Barton 121, 339
——— v. Baugh 141
——— v. Baylor 282
——— v. Briggs 78, 79
——— v. Cuddon 169, 224
——— v. Foljambe 170
——— v. Jackson 157, 158
——— v. Tommy... 260
Whitfield v. Prickett 47
Whitmarsh v. Robertson 336
Whitmore v. Turquand 76, 337
Whitney v. Smith 246
Widdowson v. Duck 232
Wiglesworth v. Wiglesworth 167
Wilding v. Bolder 132, 285
——— v. Richards 76
Wiles v. Gresham 193, 222, 287
Wilkes' Charity, *Re* 153, 155, 242

Page.
Wilkins v. Hogg 209
——— v. Sibley 324
Wilkinson v. Bewick 142
——— v. Duncan 174
——— v. Hartly 224
——— v. Lindgren 358
——— v. Mallin 241, 262
——— v. Parry 192, 327, 344
——— v. Wilkinson 212, 214
Wilks v. Groom 141, 421
Willats v. Busby 364, 344
Willes v. Greenhill 274, 280, 281, 325
Willett v. Blandford 251, 253
Williams, *Re* 49, 354
Williams v. Allen 323, 343
——— v. Arkle 86
——— v. Bayley 115
——— v. Coade 86
——— v. Corbett 80, 215
——— v. Duke of Bolton 144
——— v. Earle 449
——— v. Kershaw 86, 356
——— v. Nixon 193, 201
——— v. Thorpe 278
——— v. Williams 94
Williams' Settlement, *Re* 328
Willis v. Hiscox 269
——— v. Kibble 247
——— v. Willis 88
Wilmot v. Pike 281
Wilson v Bell 81
——— v. Clapham 83
——— v. Maddison 82
——— v. Peake 166
Wilton v. Hill 337
Wiltshire v. Rabbits 281
Winch v. Brutton 79, 80
——— v. Keeley 131
Wise v. Wise 120
Withers v. Withers 87
Withington v. Withington... 330
Wollaston v. Tribe 112
Wood, *Re* 420
Wood v. Bittlestone 431
——— v. Cox 78, 80, 84
——— v. Dixie 61
——— v. Downes 261, 339
——— v. Gaynon 144
——— v. Richardson 169
——— v. Stanes 284
——— v. Weightman 236
Woodburn v. Grant 278
Woodfall v. Arbuthnot 437

Page
Woodford v. Charnley 55, 56
Woodgates' Settlement, *Re* 434
Woodhead v. Marriott 314
Woodhouselee v. Dalrymple 177
Woods v. Axton 213
——— v Woods 81, 346
Woodyatt v. Gresley 322, 323
Woollaston v. Tribe 72
Woolmore v. Burrows 24
Worcester, *Re* 278, 279
Worley v Frampton 225
Worrall v. Harford 215, 209, 212
Wragge, *Re* 438
Wray v. Steel 87
Wren v. Kirton 237
Wright v. Pearson 21
——— v. Snowe 128, 180
——— v Vanderplank 111, 118
——— v. Wright 25
Wyatt v. Sharratt 339
Wyche, *Re* 247
Wynne v. Humberston 212, 272

Y.

Yarnold v. Moorehouse 45
Yeap Cheah Neo v. Ong Cheng Neo 352
Yellappa-bin Basappa v Mantappa-bin Basapa 292
Yem v. Edwards 108
Yenkoba v. Rambhaji 28
Yode v. Cloud 136
York v. Brown 246
York Buildings Co. v. Mackenzie 261, 289, 290
Young v. Martin 79
——— v. Peachy 90
Younger v. Welham 241
Younghusband v. Gisborne 42, 272

TABLE OF ACTS.

	Page
XIX of 1841, s. 7	249
I of 1845, s. 21	103
VII of 1849	250
II of 1850	250
XXXI of 1854, s 17	229
XXI of 1855, ss. 2, 3	228
LV of 1858	227
——, s. 10	249
——, ss. 11, 25	228
VIII of 1859, s. 260	102, 103
XXI of 1860	354, 391
——, ss. 1, 2, 3	391
——, ss. 4, 5, 6, 7, 8	392
——, ss. 9, 10, 11, 12	393
——, ss. 13, 14	394
——, ss. 15, 16, 17, 18, 19	395
——, s. 20	396
XLV of 1860, s. 62	126
——, ss. 126, 127, 169	127
——, ss. 405, 409	15, 183
XX of 1863	16, 387, 396
——, ss, 1, 2, 3	397
——, ss. 4, 5	398
——, ss. 6, 7	399
——, ss. 8, 9, 10, 11	400
——, ss. 12, 13, 14	401
——, s. 15	402
——, ss. 16, 17, 18	404
——, ss. 19, 20, 21, 22	406
——, ss. 23, 24	407
XVII of 1864	407
——, s. 1	332, 407
——, s. 2	407
——, ss. 3, 4, 5, 6, 7	408
——, s. 8	332, 366, 409
——, s. 9	409
——, s. 10	332, 366, 409
——, s. 11	250, 409
——, ss. 12, 13	410
——, s. 14	164, 410
——, ss. 15, 16	410
——, ss. 17, 18, 19	411
——, ss. 20, 21, 22	412
——, ss 23, 24, 25, 26	413
——, ss. 27, 28, 29, 30	414
——, ss. 31, 32	415

Page

XX of 1864, ss. 10, 25 228
X of 1865 131
———, s. 4 ... ... 125, 324
———, ss 46 125
———, s. 101 39
———, s. 105 ... ... 352, 371
———, ss 187, 190 342
———, s. 229 121
———, ss. 316, 326 123
IV of 1866, s 3 418
XXVII of 1866 ... ... 15, 355, 415
———, ss. 1, 2 415
———, ss. 3, 4 418
———, ss. 5, 6 419
———, ss. 7, 8, 9 420
———, ss. 10, 11 421
———, ss. 12, 13, 14 422
———, ss. 15, 16, 17 423
———, ss. 18, 19... 424
———, s. 20 425
———, s. 21 426
———, ss. 22, 23 427
———, ss. 24, 25 428
———, ss. 26, 27... 429
———, ss. 28, 29... 430
———, ss. 30, 31, 32 431
———, s. 33 432
———, s. 34 433
———, s. 35 ... ... 16, 434
———, s. 36 436
———, ss. 37, 38, 39 437
———, s. 40 438
———, ss. 41, 42, 43, 44 439
———, s. 45 ... ... 367, 440
———, s. 46 440
———, ss. 47, 48, 49 441
———, ss. 50, 51 442
———, ss. 52, 53, 54 443
XXVIII of 1866 ... ... 15, 443
———, s. 1 443
———, s. 2 ... ... 223, 444
———, s. 3 ... ... 225, 444
———, s. 4 ... ... 225, 445
———, s. 5 ... ... 164, 445
———, s. 6 445
———, ss. 7, 8, 9 446
———, ss. 10, 11, 12 447
———, ss. 13, 14, 15, 16, 17 448
———, ss. 18, 19, 20 449
———, ss. 21, 22, 23 450
———, ss. 24, 25 451
———, ss. 26, 27, 28 452
———, ss. 29, 30, 31 453

Page
XXVIII of 1866, s. 32 ... ... 226, 453
———, s. 33 ... ... 227, 454
———, s. 34 ... ... 333, 454
———, s. 35 456
———, s. 36 ... ... 229, 456
———, s. 37 ... ... 210, 456
———, s. 38 457
———, s. 39 ... ... 208, 457
———, ss. 40, 41 458
———, s. 42 459
———, s. 43 ... ... 218, 459
———, ss. 44, 45, 46 460
I of 1869, ss. 17, 20 371
IV of 1870 (B. C.), s. 86 228
XI of 1870 131
XIV of 1870 415
XXI of 1870 40
———, s. 7 342
IX of 1871, s. 10 304
I of 1872, ss. 107, 108 177
———, s. 111 111
———, s. 116 100
IX of 1872, s. 11 ... ... 124, 127
———, s. 12 124
———, ss. 15, 22 ... ... 111, 271
———, s. 23 ... ... 33, 38
———, ss. 57, 58 49
———, s. 157 319
II of 1874, ss. 50, 52, 53, 55 250
III of 1874, ss. 2, 4 125
XIII of 1874 228
I of 1877 17
———, s. 2, ill. (*b*) 111
———, ss. 3, 10 15
———, s. 10 137
———, s. 11 156
———, s. 12, cl. (*a*) 271
———, s. 27 343
———, s. 54 287
X of 1877, ch. viii 275
——— xxxiv 182
———, s. 10 129
———, ss. 15, 16 26
———, ss. 26, 27, 28 341
———, ss. 30, 438, 439 345
———, s. 89 28
———, s. 111, ill. (*a*) 276
———, s. 317 102
———, s. 373 233
———, s. 430 129
———, s. 437 ... ... 140, 342
———, ss. 437, 439, 539 15
———, s. 539 ... ... 130, 358, 363

Page

X of 1877, s. 638 27
XV of 1877, s. 10 ... ... 15, 186, 187, 260, 304, 305
———, s. 18 305
———, s. 20 241
———, s. 21 241
———, arts. 98, 100, 103, 134 ... ... 15, 304, 305
———, arts. 120, 131 377
I of 1879, sched. i, art. 60 330
XII of 1879, s. 72 ... ... 140, 342
I of 1880 ... ... 354, 380, 461
———, s. 1 461
———, s. 2 ... ... 365, 461
———, s. 3 ... ... 366, 461
———, s. 4 ... ... 366, 462
———, s. 5 ... ... 366, 426
———, ss. 6, 7, 8 462
———, s. 9 463
V of 1881, s. 19 121
———, s. 92, ill. (a) 222
———, s. 117 ... ... 173, 221
———, ss. 135, 145 123

TABLE OF STATUTES.

	Page
1 Ed. VI, c. 14	350
27 Hen. VIII, c. 10	6, 350
13 Eliz., c. 5	54, 59, 92
27 Eliz., c. 4	66, 67, 69
30 Eliz., c. 18, s. 3	66
43 Eliz., c. 4	353
9 Geo. II, c. 36	351
39 & 40 Geo. III, c. 98	38
55 Geo. III, c. 160	353
2 & 3 Will. IV, c. 115	353
5 & 6 Will. IV, c. 76	124
8 & 9 Vict., c. 59, s. 2	353
11 & 12 Vict., c. 21, s. 7	131, 132
———, ss. 9, 24	65
———, s. 23	132, 278
13 & 14 Vict., c. 60	417, 418
———, ss. 3, 4, 5	419
———, ss. 6, 7, 8	420
———, ss. 9, 10	421
———, ss. 11, 12	422
———, ss. 13, 14, 15, 16	423
———, ss. 19, 20	425
———, s. 22	426
———, s. 23	427
———, ss. 24, 25	428
———, ss. 26, 27	429
———, s. 29	431
———, ss. 30, 31	433
———, ss. 32, 33	434
———, s. 34	436
———, ss. 35, 36	437
———, ss. 37, 40	438
———, ss. 41, 42, 43	439
———, ss. 44, 45	440
———, ss. 48, 49	441
———, ss. 50, 52	442
15 & 16 Vict., c. 55	417
———, s. 1	432
———, s. 2	424
———, s. 3	431
———, ss. 4, 5, 6	430
———, s. 7	443
———, s. 13	441
8 & 19 Vict., c. 91, s. 10	418
19 & 20 Vict., c. 120, s. 41	460
22 & 23 Vict., c. 35	443

Page

22 & 23 Vict., c. 35, s. 1 449
———, ss. 2, 3 450
———, ss. 10, 12 451
———, ss. 14, 15, 16 452
———, ss. 19, 21, 23 453
———, s. 26 457
———, s. 27 458
———, s. 28 459
———, s. 29 459
———, s. 30 ... ... 218, 460
———, s. 31 457
23 & 24 Vict., c. 145 443
———, s. 1 444
———, ss. 2, 3, 4, 7 445
———, ss. 11, 12, 13, 14 446
———, ss. 15, 16, 17 447
———, ss. 18, 19, 20, 21, 22 448
———, ss. 23, 24 449
———, ss. 25, 26 454
———, s. 27 455
———, ss. 28, 29 456
———, s. 30 457
———, s. 34 460
24 & 25 Vict., c. 96, ss. 80, 86 183
———, c. 104 ... ... 27, 416
33 Vict., c. 14 129

BENGAL SECRETARIAT LIBRARY.

LECTURE I.

ORIGIN OF TRUSTS IN ENGLAND.

Origin of Trusts in England — Tenures — Feudal system — Sub-infeudation — Estates of freehold — Alienation of estates — Gifts to religious houses — Mortmain — Uses — Statute of Uses — Object of Statute — Legal and equitable estates — Trusts among Hindus — Krishnaramini Dasi's case — Tagore case — Trusts for creditors — Family religious trusts — Legislation in India — Arrangement of subject — Definition of trust — Must be confidence — Merger — Definition of terms — Kinds of trust — Simple trust — Special trust — Ministerial and discretionary trust — Mixture of trust and power — Lawful and unlawful trusts — Public and private trusts — Executed and executory trusts — Austen *v.* Taylor — Jervoise *v.* The Duke of Northumberland — Coape *v.* Arnold — Executory trusts in marriage articles and wills — Distinction between them — Marriage articles — Blackburn *v.* Stables — Jervoise *v.* Duke of Northumberland — Will — *Cy près* — Intention — General Rules — Subject-matter of trust — Trusts against policy of law — Title of honor — Trusts of immoveable property without the jurisdiction of a Court — Penn *v.* Lord Baltimore — Act X of 1877, ss. 15, 16 — High Courts' Charter — Letters Patent — Suits for land — Foundation of jurisdiction — Court of Equity acts *in personam* and not *in rem* — Land may be in a foreign country — Angus *v.* Angus — Lord Cranstown *v.* Johnston — Privity — Foundation of jurisdiction — Injunction restraining proceeding by other Courts — Trusts of moveable property abroad — Object must be lawful — General rule for ascertaining whether trust lawful — Indian Contract Act, s. 23 — Trusts contrary to policy of law or founded upon illegal contract void — Assignment of half pay — Trusts for future illegitimate children — Trust for illegitimate children in being, or *en ventre sa mère* — Trust forbidden by law — Trusts postponing enjoyment of property or restraining alienation — Accumulation — Perpetuities among Hindus — Restraint on alienation — Condition restraining alienation after absolute gift — Insolvency — Trust to cease on bankruptcy or insolvency — Trust to cease on happening of particular event — Clauses of forfeiture construed strictly — Trust for immoral purposes — Failure of trust — Illegal purpose failing — Must be a *cestui que trust* — Trust partly lawful and partly unlawful — Trust of immoveable property in foreign country.

Origin of Trusts in England.

THE Law of Trusts as administered in India closely resembles the English law in the general principles applied, although the system upon which it is administered is different; I propose, therefore, in the first place, to describe the origin and growth of trusts in England. In order to do this, it is necessary to go back to the time of the Norman conquest, and to consider shortly the tenures by

Tenures.

LECTURE I

Feudal system.

which lands in England are held. At the time of the conquest, the greater part of the land was confiscated, and was granted by the conqueror to his followers according to what is known as the feudal system. The lands were held by the grantees from the sovereign, upon condition that they should, when called upon, perform certain military duties. The sovereign was considered to be the owner of the granted lands, and was called the lord paramount, while the services to be rendered were regarded as incident, or annexed to the ownership of the land; in fact, the rent to be paid for it.[1] At first the interest of the grantee in the lands granted did not extend beyond his own life. In course of time it gradually improved in stability and acquired an hereditary character, so much so, that the grantee, considering himself as substantially the owner, began to imitate the example of his sovereign by carving out portions of his land, to be held of himself by some other person, on terms and conditions similar to those of the original grant. This method of creating estates in the granted land was termed sub-infeudation. A continued chain of successive dependencies was thus established, connecting each stipendiary or vassal with his immediate superior or lord.[2] The grant, as we have seen, did not originally extend beyond the life of the first vassal; but, in process of time, grants were made to a man and his sons, and then to a man and his heirs. This method of holding lands gave rise to the fundamental maxim, which still prevails as regards land in England, that all land belonging to any subject in the realm is holden of some superior, and either mediately or immediately of the sovereign. And as all lands were holden, they were called tenements; the possessors, tenants; and the manner of their possession, a tenure.[3] There is no such thing, according to the English law, as the absolute ownership of land. All that a subject can have, is an estate in the land.

Sub-infeudation.

Estates of freehold.

The only estates with which we need concern ourselves, are those which are called freehold estates, because they were the only estates which a free man would hold,—namely, estates for life, in tail, and in fee-simple. If land was granted to a man simply without more, that gave him an estate for his life only, and on his death the land escheated to the grantor. If land was granted to a man

[1] Williams on Real Property, 2. [2] 1 Bl. Com., 175. [3] *Ibid*, 186.

and the heirs of his body, he was said to have an estate tail, which descended on his death to his lawful issue, children, grandchildren, and more remote descendants, so long as his posterity endured. If the first owner, or any descendant who had succeeded to the estate, died without children, the estate escheated to the grantor or his heir. If land was granted to a man and his heirs, he had an estate in fee-simple. This estate descended on his death to his heirs. If he died without children, the estate went to his collateral relations, and only escheated on the failure of all persons who could possibly claim through him.[1] All these estates were originally inalienable either during the lifetime of the holder, unless with the consent of the lord, or by will. It would be foreign to the purpose of these Lectures to trace the steps by which the right of alienation was acquired, but I will endeavour shortly to explain the means used for the transfer of an estate from one person to another.

Alienation of estates.

The most ancient form of conveyance, was a feoffment with livery of seisin. The feudal doctrine that all estates in land are holden of some lord, necessarily implies that all lands must always have some feudal holder or tenant. This feudal tenant is the freeholder, or holder of the freehold. He has the feudal possession, called the seisin; and so long as he is seised, nobody else can be. The freehold is said to be in him, and until it is taken out of him and given to some other, the land itself is regarded as in his custody or possession. A feoffment with livery of seisin, was the gift of an estate in the land, accompanied with livery,—that is, delivery of the seisin or feudal possession. At the time of the gift, the nature of the estate to be taken by the person to whom it was given, or feoffee, was marked out or limited.[2] Before the reign of Henry VIII, a simple gift of lands to a man and his heirs, accompanied by livery of seisin, was all that was necessary to convey to that person an estate in fee-simple in the lands. The Courts of Law did not deem any consideration necessary; but if a man voluntarily gave lands to another, and put him in possession of them, they held the gift to be complete and irrevocable, just as a gift of money or goods, made without any consideration, is, and has ever been, quite beyond the power of the giver to retract, if accompanied by delivery

[1] See Williams on Real Property, Chaps. I, II, III.
[2] *Ibid*, 136.

LECTURE I.

of possession. In law, therefore, the person to whom a gift of lands was made and seisin delivered, was considered thenceforth to be the true owner of the lands,[1] and his estate was known as the legal estate. We have now to consider how another class of estates, known to English law as equitable estates, arose.

Gifts to religious houses.

After the power of alienation had been acquired, it became a common thing for the grantees of estates to convey them to religious houses. The members of these houses were unable, by reason of their profession, to perform the military services required by the feudal law; they obtained great quantities of land, and an undue proportion of wealth and power. As religious houses fell under the legal description of corporations, who possess the character of perpetuity, the lord was deprived of the benefits he derived from escheats. Lands belonging to such bodies were consequently said to be in *mortuâ manu*, or in mortmain, because they produced none of the advantages to the feudal lords, which lands held by individuals did. In order to check conveyances to religious houses and corporations, various Statutes, called the Statutes of Mortmain, were passed, prohibiting corporations from purchasing land, unless a license in mortmain was procured from the lord. In order to evade these Statutes, the following device was resorted to by the ecclesiastical bodies. The grant, instead of being made direct to the religious house, was made to some person to the use of the religious house. A gift of this kind conferred no estate or interest whatever in contemplation of law on those whose benefit was designed, for the principle of feudal tenure was, to look no further than to the actual and ostensible tenant, and to consider him alone as the proprietor.[2] The use, therefore, declared upon such a gift, being in the view of the ordinary Courts of Justice a nonentity, escaped the operation of the Statutes of Mortmain.[3] "The laity were not long behind in resorting to this contrivance as regards both land and chattels, to enable them to defeat creditors of their executions and for other fraudulent purposes, frequently, it seems, selecting some person as their feoffee, who from his station and power might aid them in setting the law at defiance. Subsequently, conveyances to uses were put in practice by the laity for less objectionable purposes. During the civil

Mortmain.

Uses.

[1] Williams on Real Property, 151. [2] 1 Cru. Dig, 402. [3] 1 Bl. Com., 357.

wars occasioned by the claims of the rival Houses of York and Lancaster, every person who could be accused of having sided with the defeated party, was liable to attainder, and by consequence, to the confiscation of his estates. To avoid this hazard, secret conveyances to uses, or upon special trusts, appear to have been resorted to by persons of every rank and condition. In the reign of Edward IV, at which time this mode of conveyance had become fully established, the Judges expressly held, that a use was not forfeitable by attainder; this would of course confirm the practice."[1] When a feoffment was made to uses in this way, the legal estate was in the feoffee. He filled the possession, did the feudal duties, and was, in the eye of the law, the tenant of the fee. The person to whose use he was seised, called by the law writers the *cestui que use*, had the beneficial property in the lands, had a right to the profits, and a right to call upon the feoffee to convey the estate to him and to defend it against strangers. This right at first depended upon the conscience of the feoffee; if he withheld the profits from the *cestui que use*, or refused to convey the estate as he directed, the *cestui qui use* was without remedy. To redress this grievance, the writ of subpœna was devised, or rather adopted from the Common Law Courts, by the clerical Chancellors, to oblige the feoffee to attend in Court and disclose his trust; and then the Court compelled him to execute it. This writ is said to have been first issued by John Waltham, Bishop of Salisbury, who was Lord Keeper in the reign of Richard the Second. "No sooner was this protection extended than half the lands in the kingdom became vested in feoffees to uses. Thus, in the words of an old counsellor, the parents of the trust were Fraud and Fear, and a Court of Conscience was the Nurse."[2] "The power assumed by the clerical Chancellors in controlling the maxims and principles of the Common Law, cannot be considered as short of legislative; for not only, in virtue of a law created for private convenience and independent of the Common Law, was the person legally entitled deprived of all the beneficial incidents of property; but a distinct title to the enjoyment was introduced, not only unknown to, but at first repudiated by, the law: the legal title indeed was not directly affected, yet the legal owner was compelled to exercise his legal rights, so as only to be subservient to

[1] 1 Spence's Eq. Jur., 440. [2] Lewin's Introduction, 2.

LECTURE I.

the protection and enjoyment of this equitable interest: although by this means, as regarded the real owner of the estate, the legal rights of third persons, including the Crown, were defeated, which indeed was one of the palpable objects for which trusts were introduced."[1] Uses were not considered as issuing out of or annexed to the land, as a rent, a condition or a right of common, but as a trust reposed in the feoffee, that he should dispose of the lands at the discretion of the *cestui que use*, permit him to receive the rents, and in all other respects have the beneficial property of the lands. Thus, between the feoffee and *cestui qui use*, there was a confidence in the person and privity in estate.[2] But this was only as between the feoffee and the *cestui que use*. To all other persons the feoffee was as much the real owner of the fee as if he did not hold it to the use of another. He performed the feudal duties, his wife was entitled to dower, his infant heir was in wardship to the lord, and upon attainder the estate was forfeited.[3] The doctrine of uses, as regulated and settled by the Court of Chancery, was so applied that it became productive of serious grievances. Persons who had a claim to the lands could not find out the legal tenant against whom it was necessary to proceed. Husbands were deprived of their curtesy, and widows of their dower, creditors were defrauded, purchasers for valuable consideration were frequently defeated, and the king and other feudal lords were deprived of their tenures, and other inconveniences attended the secrecy observed in making conveyances to uses, by which the beneficial interest belonged to one person and the legal estate to another.[4]

Statute of Uses.

To remedy these inconveniences, the Statute of Uses[5] was passed by which the possession was divested out of the persons seised to the use, and transferred to the *cestui que use*. By this Statute it was enacted, that where any person or persons shall stand seised of any lands or other hereditaments to the use, confidence, or trust of any other person or persons, the persons that have any such use, confidence, or trust (by which was meant the persons beneficially entitled) shall be deemed in lawful seisin and posses-

[1] Spence's Eq. Jur., 436.
[2] Chudleigh's case, 1 Rep., 120; Burgess v. Wheate, 1 W. Bl., 123.
[3] Co. Lit., 271.
[4] See Watkins on Conveyancing, 287; Sandars on Uses, 1—62.
[5] 27 Hen. VIII, c. 10.

sion of the same lands and hereditaments for such estates they have in the use, trust, or confidence. LECTURE I.

The modern doctrine of uses, as distinguished from trusts, was introduced by this Statute. Uses, therefore, in the modern acceptation of the word, are such limitations of lands and other hereditaments as are executed by the Statute and confer on the beneficial owner the legal estate; and trusts are similar to what uses were at Common Law before the passing of the Statute. Uses, under the Statute, were subject to the jurisdiction of the Courts of Common Law, and trusts to that of the Courts of Chancery or Equity.[1]

Object of Statute.

The object of this Statute was to abolish the jurisdiction of the Court of Chancery over landed estates by giving actual possession at law to every person beneficially entitled in equity. But the Court of Chancery recovered its power in the following manner. Soon after the passing of the Statute of Uses, a doctrine was laid down, that there could not be a use upon a use. For instance, suppose a feoffment had been made to *A* and his heirs, to the use of *B* and his heirs, to the use of *C* and his heirs, the doctrine was, that the use to *C* and his heirs was a use upon a use, and was, therefore, not affected by the Statute of Uses, which could only execute or operate on the use to *A* and his heirs. So that *B*, and not *C*, became entitled under such a feoffment to an estate in fee-simple in the lands comprised in the feoffment. This gave the Court of Chancery an opportunity for interfering. It was manifestly inequitable that *C*, the party to whom the use was last declared, should be deprived of the estate which was intended solely for his benefit; the Courts of Chancery, therefore, interposed on his behalf, and constrained the party to whom the law had given the estate, to hold in trust for him to whom the use was last declared. So that whenever it is wished to vest a freehold estate in one person as trustee for another, the conveyance is made unto the trustee or some other person and his heirs, to the use of the trustee and his heirs, in trust for the party intended to be benefited (called *cestui que trust*) and his heirs. An estate in fee-simple is thus vested in the trustee by force of the Statute of Uses, and the entire beneficial interest is given over to the *cestui que trust* by the Court of Chancery. The estate in fee-simple which is vested in the trustee is called the legal estate,

[1] Watkins on Conveyancing, 288.

LECTURE I.

Legal and equitable estates.

being an estate to which the trustee is entitled only in the contemplation of a Court of Law, as distinguished from equity. The interest of the *cestui que trust* is called an equitable estate, being an estate to which he is entitled only in the contemplation of the Court of Chancery which administers equity.[1] The *cestui que trust* is the beneficial owner of the property. The trustee, by virtue of his legal estate, has the right and power to receive the rents and profits; but the *cestui que trust* is able, by virtue of his estate, in equity, at any time, to oblige his trustee to come to an account and hand over the whole of the proceeds.[1] The general idea of a use or trust answered more to the *fidei commissum* than the *usus fructus* of the civil law, which latter was the temporary right of using a thing without having the ultimate property or full dominion of the substance; but the *fidei commissum*, which usually was created by will, was the disposal of an inheritance to one, in confidence, that he should convey it, or dispose of the profits, at the will of another. The right of the latter was originally considered in the Roman law as *jus precarium*, —that is, one for which the remedy was only by entreaty or request; but by subsequent institution, it acquired a different character,—it became *jus fiduciarium*, and entitled to a remedy from a Court of Justice, and it was the business of a particular magistrate, the *praetor fidei commissarius*, to enforce the observance of these confidences.

We see, therefore, that, according to the English law, there may be two persons holding different estates in the same property. Both are entitled to convey their estates, both are entitled to the rents and profits: one, the legal owner, to receive them; the other, the equitable owner, to enjoy them. This concurrent existence of two systems of jurisprudence is known, I believe, only to the English law, and led to doubts as to whether trusts could be created by Hindus. "The Hindu law," said Peacock, C. J.,[2] "so far as I am acquainted with it, makes no provision for trusts. There is nothing in the Hindu law at all analogous either to trusts of the English law or to the *fidei commissa* of the Roman law, which were probably the origin of trusts in the English law." In *S. M. Krishnaramini Dasi* v. *Ananda Krishna*

Trusts among Hindus.

Krishnaramani Dasi's case.

[1] Williams on Real Property, 157.

[2] Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb, 2 B. L. R., O. C., 36.

Bose,[1] Markby, J., quoting the above case, decided, that trusts could not be created by Hindus. His Lordship said, that there was not the least ground for supposing that anything like the English law of trusts existed in Hindu law,—that is to say, a system according to which property subject to a trust has to be viewed under a double aspect,—that of the trustee on the one hand, who is declared by law to be the absolute and uncontrolled owner; and the *cestui que trust* on the other, who has a right in equity to interfere in the ownership and compel the trustee to abandon all or nearly all his rights in his (the *cestui que trust's*) favour. "There is not," continued his Lordship, "a trace of it in any passage of any work on Hindu law that I have seen. There is not an indication of it in the habits of the people, and so far from the English system of trusts resting on principles of jurisprudence, which, though dormant, may be considered as universally present, it is undoubtedly one of the most anomalous institutions in the whole history of law—one that could never have possibly been conceived *à priori*, or worked out from any general principle, and is distinctly the product of our own time." On appeal, however,[2] Peacock, C. J., explained the passage from his judgment cited above, saying, "I did not say, nor did I intend to say, that a devise upon trust for a purpose which might be legally carried into effect without the intervention of trustees would necessarily be void. There are many cases in which trusts have been enforced against Hindus both by the Courts in this country and by Her Majesty in Council upon appeal." Macpherson, J., said in p. 284:—"I think that, for various reasons,—because there is nothing in Hindu law which is repugnant to, or inconsistent with, the idea of trusts,—because trusts are not unknown to the Hindu law,—and because trusts, as among Hindus, have been recognized and administered for the last century almost, by this Court and the late Supreme Court,—we are bound so to recognize trusts and to give effect to them. I think that, both by Hindu law, and the practice which has always prevailed in our Courts, a Hindu may legally deal with his property so as to create a trust—a relation in many respects similar to, although not necessarily identical with, that known in English law as the relation of trustee and *cestui que trust*. I concede that

[1] 4 B. L. R., O. C., 231. [2] *Ibid*, 278.

LECTURE I.

trusts, in the strict sense in which an English lawyer uses the term,—that is to say, trusts, to the existence of which a 'legal' estate and an 'equitable' estate, wholly separate from and independent of each other, are necessary, were unknown to the old Hindu law. There being no distinction in Hindu law between legal and equitable estates, it was, of course, impossible that there should be anything corresponding to the two estates which are so well known to the English law; nevertheless, trusts, in the wider sense of the term, were by no means unknown in the tenets of Hindu law. I do not speak of the various personal ordinary trusts, such as deposits and bailments, which are expressly recognized and dealt with by all the writers on Hindu law. The existence of such trusts does not affect the present question, which relates solely to special trusts, where the person to whom property is given is bound to use it for the benefit of another, or to apply it in a particular manner indicated, and not necessarily for his own advantage. But in the case of endowments for religious and charitable purposes, and gifts to idols, there is no doubt that trusts have always been known. It is said, that in a gift to an idol there is no trust, and that there is an actual gift to the idol. It may be so in words; but, by whatever name it is called, it is a mere setting apart of property which is to be held and used by the manager for the time being, whether he be a priest or whoever he may be, for the purpose, in the first instance, of providing for the worship of the idol, or of carrying out the religious or charitable objects of the original donor. Practically, if a trust were not recognized in such cases by Hindu law, no endowment or gift to an idol, or for religious or charitable purposes, could have any permanent effect; while, as a matter of fact, we see such endowments are very carefully preserved and are continued from generation to generation. But granting, for the sake of argument, that trusts are not expressly recognized by the old Hindu law, that is not, in my opinion, any reason why we should now conclude that they are invalid. There is nothing in Hindu law which forbids trusts, or is in any way repugnant to them or inconsistent with their existence. The Hindu law system is not, and does not profess to be, exhaustive; on the contrary, it is a system in which new customs and new propositions, not repugnant to the old law, may be engrafted upon it from time to time,

according to circumstances and the progress of society. Fiduciary relations extend as the transactions and intercourse between men extend. In all probability, trusts had, by degrees, sprung into existence before we find any record of them in our reports, just as I believe the custom of making wills, although it may be of no very ancient origin, prevailed among Hindus quite independently of any decisions in the Courts, or any intervention of English lawyers. The Supreme Court was called on to grant, and did grant, probate of the will of a Hindu within a few months after the Court was instituted; and we find the earliest legislation recognizing the wills of Hindus. There is not necessarily anything anomalous or unnatural in the constitution of trusts. The general position of trusts in English law with these two absolutely separate estates, the legal and the equitable, may be somewhat anomalous. But this is the result of the peculiar procedure in England, where the Court of Chancery has always been distinct from the Courts of Common Law, and equitable rights are kept wholly apart from legal. The peculiarity of the English law of trusts arises out of specialities of procedure. But questions of procedure cannot affect the question, whether trusts are to exist, or whether Courts are to give effect to them. I cannot see that the fact that this Court is a Court of Equity as well as of law, and that our procedure differs from that of the old Supreme Court, creates any difficulty in giving effect to, or administering, trusts, or in any way affects the question of substantive law as to whether trusts can or cannot be created." In *Ganendra Mohan Tagore* v. *Upendra Mohan Tagore*,[1] Phear, J., said:—"I confess, the broad assertion that trusts are unknown to Hindu law took me somewhat by surprise. There is, probably, no country in the world where fiduciary relations exhibit themselves so extensively and in such varied forms as in India, and possession of dominion over property, coupled with the obligation to use it, either wholly or partially, for the benefit of others than the possessor is, I imagine, familiar to every Hindu. I need only point to the cases of the mother acting as guardian of her infant child, the *karta* of a joint family managing on behalf of minor or absent members, and the gomasta buying, selling, and trading in his own name for the bene-

Tagore case.

[1] 4 B. L. R., O. C., 131.

LECTURE I.

fit of an unseen principal. If it be said that in these instances and others which might be mentioned, the guardian, manager or gomasta is only an agent, and differs from a trustee, in the strictest sense of the word, in this, namely, that his powers are referable to the authority of the person for whose benefit he acts, and not to any sort of ownership in himself, I would add that, in my opinion, this circumstance does not materially affect the essence of the trust. No doubt, in this country, where Courts of Justice are not distinguished by their functions into Courts of Law and Courts of Equity, and where law and equity are administered by the same tribunal, there is no occasion for the creation and maintenance of an equitable estate in property as separate from the legal estate. There is, consequently, no such thing here as a bare legal estate in one man descendible to heirs, side by side, with a beneficial estate of inheritance, or a succession of beneficial estates in the same property passing down another series of persons. And this, I understand, is all that the Chief Justice and Mr. Justice Markby intended to lay down in the two judgments to which I have been referred.[1] But I think, that whether a man accepts property on the terms of giving another person a specified benefit out of it, or whether he undertakes to manage property on behalf of another, our Courts will, in both cases alike, know how to make him discharge the obligation under which he comes; and I do not hesitate to believe that it is in entire accordance with the genius of the Hindu law that they should do so.

"Although our Courts know nothing of a legal title as distinguished from an equitable title, they can, I apprehend, easily understand the predicament of property placed under the dominion and control of one person, in order that he may deal with and manage it for special purposes involving the benefit of others. In few words, the non-existence of the English equitable estate does not necessitate the non-recognition of a trust. Except, perhaps, in the very rudest state of civilization, trust-ownerships will, most certainly, spring into being, and the interests of society require that, within certain limits at least, effect should be given to those by Courts of Justice." On appeal,

[1] Kumara Asima Krishna Deb *v.* Kumara Kumara Krishna Deb, 2 B. L. R., O. C., 11; and Srimati Krishnaramini Dasi *v.* Ananda Krishna Bose, 4 B. L. R., O. C., 231.

Peacock, C. J., referring to his judgment in *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*,[1] said:—"Although the Hindu law contains no express provision upon the subject of uses or trusts, I see nothing contrary to the spirit and principles of the Hindu law in a devise to trustees, giving a beneficial interest to a person to whom it might have been given by a simple devise without the intervention of trustees . . . It is too late to contend that all gifts or alienations upon trust are void, because the ancient Hindu law makes no express mention of them. All that I laid down in the case of *Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*[2] was, that a devise for a purpose which would be void as a condition, would be void in the shape of a trust." Finally, on appeal to the Privy Council, it was argued that an estate to be held in trust can have no existence by the Hindu law. Their Lordships, however, said:—"The anomalous law which has grown up in England of a legal estate which is paramount in one set of Courts, and an equitable ownership which is paramount in Courts of Equity, does not exist in, and ought not to be introduced into, Hindu law. But it is obvious that property, whether moveable or immoveable, must, for many purposes, be vested, more or less absolutely, in some person or persons for the benefit of other persons, and trusts of various kinds have been recognized and acted on in India in many cases. Implied trusts were recognized and established here in the case of a *benami* purchase in *Gopee Krist Gosain* v. *Gunga Persaud Gosain*;[3] and in the cases of a provision for charity or other beneficent objects, such as the professorship provided for by the will under consideration, where no estate is conferred upon the beneficiaries, and their interest is in the proceeds of the property (to which no objection has been raised), the creation of a trust is practically necessary. If the intended effect of the argument upon this point was to bring distinctly under the notice of their Lordships the contention that, under the guise of an unnecessary trust of inheritance, the testator could not indirectly create beneficiary estates of a character unauthorized by law, and which could not directly be given without the intervention of the trust, their Lordships adopt the argument upon the ground that a man cannot be allowed to do by

[1] 2 B. L. R., O. C., 36. [2] 2 B. L. R., O. C., 11. [3] 6 Moo. I. A., 53.

LECTURE I.

indirect means what is forbidden to be done directly, and that the trusts can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests which the law recognizes, and that, after the determination of those interests, the beneficial interest in the residue of the property remains in the person who, but for the will, would be lawfully entitled thereto. Subject to this qualification, their Lordships are of opinion that the objection fails."

Trusts for creditors.

Trusts for the benefits of creditors are recognized here as divesting the owner of the property conveyed of any interest therein which can be the subject of execution until the trusts have been carried out,[1] and there are many instances of family religious trusts[2] such as trusts for the support of a family idol and for the erection of temples and bathing ghats.[3] And a trustee who misappropriates trust funds may be compelled to compensate the *cestui que trust*.[4]

Family religious trusts.

These cases show clearly that there is such a law as the law of trusts existing in this country, and it is difficult to imagine a state of civilization in which some system of trusts should not exist. Without such a system it would be impossible to provide for persons under disability, such as infants and lunatics. It would be impossible to provide for religious or charitable purposes, and for the many instances in which one person obtains control over the property of another, without, perhaps, actual force or fraud, but under circumstances which make it inequitable that he should retain such control. In this course of lectures, I shall confine myself to those principles of the law of trusts which must be applied equally to all cases in which a person, whether governed by English, Hindu, or Muhammadan law, is bound to apply property over which he has control for the benefit of some other. With those portions of the law of trusts which are founded upon the distinction between legal and equitable estates, or upon English Statutes, I shall not attempt to deal, such, for

[1] Bamanji Manikji *v.* Naoroji Palanji, 1 Bom. H. C., 233; Bapuji Auditram *v.* Umedbhai Hathesing, 8 Bom. H C., A. C., 245; and *In re* Dhanjibhai *v.* Kharsetji Ratnagar, 10 Bom. H. C., 327.

[2] Juggutmoheenee Dosee *v.* Sokheemonee Dosee, 10 B. L. R., 19.

[3] Norton, Part II, p. 456; Purappa Vanalingam Chetti *v.* Nullasivan Chetti, 1 Mad., 415; and Venkatesa Nayudu *v.* Shrivan Shatgagopa Swami, 7 Mad., 77.

[4] Moonshee Buzzul Ruhim *v.* Shumsheroonnissa Begum, Suth., F. B., 60.

instance, as questions relating to the legal estate taken by the trustee, the devise of trust estates, and escheat. Nor shall I attempt to deal with the class of cases relating to powers under settlements, the duties of trustees for renewal of leases, and other similar branches of the law which are seldom applied in this country.

Legislation in India.

Although trusts are fully recognized in this country, there has been very little legislation with regard to them. The Penal Code[1] contains[2] provisions for the punishment of criminal breach of trust; the Specific Relief Act[3] defines[4] 'trust' and 'trustee,' and provides[5] that a trustee may sue for the possession of property to the beneficial interest in which the person for whom he is trustee is entitled; the Civil Procedure Code[6] contains provisions[7] for the conduct of suits by and against trustees, executors, and administrators, and provisions[8] as to suits relating to public charities; the Limitation Act[9] provides[10] that no suit against an express trustee or his legal representatives or assigns shall be barred by any length of time, and contains provisions[11] for the limitation of suits to make good loss caused by the breach of trust of a person deceased, for contribution against the estate of a person deceased, against the purchaser of moveable property from a trustee, and against the purchaser of land from a trustee. With these exceptions the Indian Statute-Book is silent on the subject so far as regards the bulk of the population; for the Statute of Frauds, ss. 7 to 11, relating to declarations of trust, resulting trusts, transfer of trusts, and to judgments of *cestui que trust*, is in force only in the Presidency-Towns. The provisions of Acts XXVII and XXVIII of 1866, the Trustee Relief Acts, have always, up to a very recent date, been applied only in cases where the parties are European British subjects, as the Acts themselves state that they shall only be extended to cases to which English law is applicable. But it has been recently decided in Bombay, by West, J., in the case of *In re Kahandas Narrandas*,[12] that these provisions are applicable between Hindus. The object of the proceedings was to obtain the

[1] Act XLV of 1860.
[2] Ss. 405—49.
[3] I of 1877.
[4] S. 3.
[5] S. 10. Expl. 1.
[6] Act X of 1877.
[7] Ss 437, 439.
[8] S. 539.
[9] XV of 1877.
[10] S. 10.
[11] Sched. ii, arts. 98, 100, 133, 134.
[12] I. L R., 5 Bomb., 151.

LECTURE I.

appointment of a new trustee to a charity under s. 35 of Act XXVII of 1866. It was admitted that this could be done by the more expensive process of a regular suit, and it was contended that the expression "cases to which English law is applicable" applies to all cases in which the principles of English law have to be referred to, and that as the administration of trusts in this country is governed by the rules of the English Courts of Chancery, the Act applied to the law to be followed, not merely to cases where the parties are English. West, J., granted the application, considering that English law was applicable if the principles recognized by the English Equity Courts were applicable.

Arrangement of subject.

You are aware, no doubt, that, in the year 1879, a bill codifying the law of Private Trusts was laid before the Indian Law Commission. The object of that bill was to codify the law relating to trusts in the wider sense which I have described. It saved the rules of Mahomedan law as to *wuqf*, and it left untouched religious and charitable endowments established by Hindus and Buddhists as being matters in which the Legislature could not usefully interfere further or otherwise than has been done by Act XX of 1863. This bill has not yet become law. I think, however, that my best course in arranging the subject of these Lectures is to follow the plan upon which the bill is framed. I shall, therefore, commence by defining a trust. I shall then consider the different kinds of trusts; the creation of trusts; the duties and liabilities of trustees; their rights and powers; their disabilities; the rights and liabilities of the *cestui que trust;* vacating the office of trustee; and the extinction of trusts. I shall also consider the subject of religious and charitable trusts among European British subjects, which is not dealt with by the Act. And I shall also consider the law of trusts as applicable to religious and charitable endowments established by Hindus and Buddhists, and the rules of Muhammadan law as to *wuqf*.

Definition of trust.

A trust may be defined as an obligation imposed upon some person or persons having the ownership of property, whether moveable or immoveable, to deal with such property for the benefit of some other person or persons, or for charitable purposes. Mr. Lewin adopts Lord Coke's definition of a *use*, the term by which, before the Statute of Uses, a trust of lands was designated, and defines a trust to be

"a confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which *cestui que trust* has no remedy but by *subpœna* in Chancery." But this definition is limited to trusts of lands only, whereas trusts may be declared of almost every kind of property. In the Specific Relief Act, I of 1877, the word 'trust' is defined "to include every species of express, implied, or constructive ownership."

Must be confidence.

There must be a confidence reposed in the trustee. It is not necessary that the confidence should be expressly reposed by the author of the trust in the trustee, for it may be raised by implication of law, as in the case of a constructive trust which is raised by a Court of Equity "whenever a person clothed with a fiduciary character, gains some personal advantage by availing himself of his situation as trustee; for, as it is impossible that a trustee should be allowed to make a profit by his office, it follows that so soon as the advantage in question is shown to have been acquired through the medium of a trust, the trustee, however good a legal title he may have, will be decreed in equity to hold for the benefit of his *cestui que trust*:"[1] as for example, when a trustee or executor renews a lease in his own name,—or where a factor, agent, partner or other person in whom confidence is reposed, takes advantage of such confidence to acquire a pecuniary benefit for himself, —in such cases he will be made to account to the person in whose interest he was bound to act, and will have to refund any profits he may have made, or make good any loss caused by his acts. These cases I shall deal with at greater length hereafter.

"Further, the trustee of the estate need not be actually capable of confidence, for the capacity itself may be supplied by legal fiction, as where the administration of the trust is committed to a body corporate; but a trust is a confidence, as distinguished from *jus in re* and *jus ad rem*, for it is neither a legal property nor a legal right to property.

"A trust is a confidence reposed in some other; not in some other than the author of the trust, for a man may convert himself into a trustee, but in some other than the *cestui que trust*; for, as a man cannot sue a *subpœna*

[1] Lewin, 7th Ed., 160.

LECTURE I.

against himself, he cannot be said to hold upon trust for himself; and if the trustee acquires the beneficial interest in the trust property, the trust is extinguished;"[1] or, in other words, where the legal and equitable interests are co-extensive and vested in the same person, the equitable merges in the legal interest.[2]

Merger.

Definition of terms.

The person who reposes the confidence is called the author of the trust; the person who accepts the confidence is called the trustee; the person for whose benefit the confidence is reposed and accepted is called the *cestui que trust*, or beneficiary; the subject-matter of the trust is called trust-property or trust-money; and the instrument, if any, by which the trust is declared, is called the instrument of trust. These definitions I have taken from the draft code.

Kinds of trust.

Having ascertained what is meant by a trust generally, I now propose to consider the different kinds of trusts. The most important division of trusts is into 'simple' and 'special' trusts.

Simple trust.

"The simple trust," says Mr. Lewin,[3] "is where property is vested in one person upon trust for another, and the nature of the trust, not being prescribed by the settlor, is left to the construction of law. In this case *cestui que trust* has *jus habendi*, or the right to be put in actual possession of the property, and *jus disponendi*, or the right to call upon the trustee to execute conveyances of the legal estate as the *cestui que trust* directs."

Special trust.

"The special trust is where the machinery of a trustee is introduced for the execution of some purpose particularly pointed out, and the trustee is not, as before, a mere passive depositary of the estate, but is called upon to exert himself actively in the execution of the settlor's intention; as where a conveyance is to trustees upon trust to sell for payment of debts."

Ministerial and discretionary trust.

"Special trusts have again been subdivided into ministerial (or instrumental) and discretionary. The former, such as demand no further exercise of reason or understanding than every intelligent agent must necessarily employ; the latter, such as cannot be duly administered without the application of a certain degree of prudence and judgment."

[1] Lewin, 14.
[2] Wade *v.* Paget, 1 Bro. C. C., 363; Phillips *v.* Brydges, 3 Ves., 126.
[3] 7th Ed., p. 18.

"A trust to convey an estate must be regarded as ministerial; for, provided the estate be vested in the *cestui que trust*, it is perfectly immaterial to him by whom the conveyance is executed."

"A fund vested in trustees upon trust to distribute among such charitable objects as the trustees shall think fit,[1] is clearly a discretionary trust, for the selection of the most deserving objects is a matter calling for serious deliberation, and not to be determined upon without due regard to the merits of the candidates, and all the particular circumstances of the case."

Mixture of trust and power.

"There is frequent mention in the books of a mixture of trust and power,[2] by which is meant, a trust of which the outline only is sketched by the settlor, while the details are to be filled up by the good sense of the trustees. The exercise of such a power is imperative, while the mode and its execution is matter of judgment and discretion."

Lawful and unlawful trusts.

Trusts may also be divided into lawful and unlawful. What trusts are unlawful I shall consider more fully when dealing with the creation of trusts. It is sufficient to state now that all lawful trusts may be enforced by a Court of Equity; and, as a rule, it may be laid down that a trust is lawful until the contrary is shown. Where a trust is unlawful and fraudulent, a Court of Equity will remain neutral, and will neither enforce the trust, nor relieve the person creating it,[3] unless the illegal purpose fails to take effect.[4]

Public and private trusts.

Again, trusts may be divided into public and private. Trusts for public purposes are such as are constituted for the benefit either of the public at large or of some considerable portion of it answering a particular description. All charitable trusts come under the description of public trusts. "Public purposes," said Lord Romilly, M. R.,[5] "are such as mending or repairing the roads of a parish, supplying water for the inhabitants of a parish, making or repairing bridges over any stream or culvert that may be

[1] Attorney-General *v.* Gleg, 1 Atk., 356; Hibbard *v.* Lamb, Amb, 309; Cole *v.* Wade, 16 Ves., 27; and Gower *v.* Mainwaring, 2 Ves., s. 87.

[2] Cole *v.* Wade, 16 Ves., 27; Gower *v.* Mainwaring, 2 Ves., 89.

[3] Brackenbury *v.* Brackenbury, 2 J. and W., 391; Childers *v.* Childers, 1 DeG. and J., 482.

[4] Symes *v.* Hughes, L. R., 9 Eq., 475.

[5] Dolan *v.* Macdermot, L. R., 5 Eq., 62; affirmed on appeal, L. R., 3 Ch., 676.

LECTURE I.

required in a parish: all these are 'public purposes' in the ordinary sense of the term, and are distinguished from 'charities' in the shape of alms-giving, building alms-houses, founding hospitals, and the like, and which are more properly termed 'charities.' It is true that, in a legal sense, they are all charities." A private trust, on the other hand, is a trust created only for the benefit of certain individuals who must be ascertained within a limited time.

Executed and executory trusts.

Finally, trusts may be divided into executed and executory. Where the trust is complete in itself,—that is to say, when the author of the trust has formally and finally declared what interest in the trust-property is to be taken by the *cestui que trust*, leaving nothing to the discretion of the trustee, the trust is said to be an executed trust. But where directions are given for the execution of some future conveyance or settlement of trust-property, and the particular limitations are not fully or accurately specified, and the trust is, therefore, not complete in itself, but merely contains heads or minutes for the disposition of property which are to be carried into effect in a more formal manner according to the intention to be collected from the instrument, the trust is said to be executory.[1] The distinction between trusts executed and executory was questioned by Lord Hardwicke in *Bagshaw* v. *Spencer*;[2] but it has long been firmly established as one of the settled rules of the Court of Chancery. It was thus stated in *Austen* v. *Taylor*[3] by Lord Northington: "The words 'executory trust' seem to me to have no fixed signification. Lord King, in the case of *Papillon* v. *Voice*,[4] describes an executory trust to be, where the party must come to the Court (the Court of Chancery) to have the benefit of the will. But that is the case of every trust, and I am very clear that this Court cannot make a different construction on the limitation of trust than Courts of Law could make on a limitation in a will, for in both cases the intention shall take place. . . . The true criterion is this; whenever the assistance of the trustees, which is ultimately the assistance of this Court, is necessary to complete a limitation, in that case, the limit-

Austen v. Taylor.

[1] Egerton v. Earl Brownlow, 4 H. L. C., 210; Tatham v. Vernon, 29 Beav., 604.
[2] 2 Atk., 577; S. C., 1 Ves., 142, 152.
[3] 1 Eden, 366, 368.
[4] 2 P. Wms., 471.

ation in the will not being complete, that is sufficient evidence of the testator's intention, that the Court should model the limitation. But where the trusts and limitations are already expressly declared, the Court has no authority to interfere and make them different from what they would be at law." And in *Jervoise* v. *The Duke of Northumberland*,[1] Lord Eldon said: "Where there is an executory trust,—that is to say, where the testator has directed something to be done, and has not himself, according to the sense in which the Court uses these words, completed the devise in question, the Court has been in the habit of looking to see what was his intention; and if what he has done amounts to an imperfection, the Court inquires what it is itself to do, and it will mould what remains to be done so as to carry that intention into execution."[2] In *Coape* v. *Arnold*,[3] Lord Cranworth, L. C., said: "In a certain sense, and to some extent, all trusts are executory, *i.e.*, in all trusts the legal interest is in some person who is bound in conscience, and so is compellable by this Court, to employ that legal interest for the benefit of others. To this extent his duties are executory. Where the subject-matter of the trust is a real estate held by a trustee for the benefit of others, and the trustee has no active duties to perform, such as paying debts, raising portions, or the like, the same rules which would have decided the rights of parties, if the beneficial interest had been legal, will, in general, prevail in deciding for whose benefit the trustee is to hold the estate. The rule is, equity follows the law—a rule essential to the convenient enjoyment of property in this country, where the artificial distinction of legal and equitable estates so extensively prevails."

Jervoise v. The Duke of Northumberland.

Coape v. Arnold.

The cases in which executory trusts usually arise are where articles are entered into previous to a marriage, the parties intending that a more formal document shall be drawn up afterwards to carry out the provisions which are indicated in the articles; or where a testator intends that his property shall be settled in a particular way upon certain persons, but does not in his will state precisely the nature of the estate which he wishes to devise. In these cases the Court is obliged to construe the instrument and to declare

Executory trusts in marriage articles and wills.

[1] 1 J. and W., 570.
[2] See also Stanley v. Lennard, 1 Eden, 95; Wright v. Pearson, *ib.*, 125.
[3] 4 DeG. M. and G., 585.

LECTURE 1.

such trusts as seem most accurately to carry out the intention of the author.

Distinction between them. Marriage articles.

A material distinction has been recognized in equity between an executory trust founded on marriage articles, and one voluntarily created, as by will. In the former case, the object of the settlement is usually to provide for the issue of the marriage. Therefore, unless the contrary clearly appear, equity presumes that it could not have been the intention of the parties to put it in the power of the parent to defeat the object of the settlement by appropriating the whole estate; and on this presumption the articles will usually be decreed to be executed by limitations in strict settlement. In *Blackburn* v. *Stables*,[1] Sir W. Grant, M. R., said:—"I know of no difference between an executory trust in marriage articles and in a will, except that the object and purpose of the former furnish an indication of intention which must be wanting in the latter. When the object is to make a provision by the settlement of an estate for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose and to appropriate the estate to himself. If, therefore, the agreement is to limit an estate for life, with remainder to the heirs of the body, the Court decrees a strict settlement in conformity to the presumable intention; but if a will directs a limitation for life, with remainder to the heirs of the body, the Court has no such ground for decreeing a strict settlement. A testator gives arbitrarily what estate he thinks fit. There is no presumption that he means one quantity of interest rather than another; an estate for life rather than in tail or in fee. The subject being mere bounty, the intended extent of that bounty can be known only from the words in which it is given; but if it is to be clearly ascertained from anything in the will, that the testator did not mean to use the expressions which he has employed in their strict, proper, technical sense, the Court, in decreeing such settlement as he has directed, will depart from his words in order to execute his intention; but the Court must necessarily follow his words, unless he has himself shown that he did not mean to use them in their proper sense; and have never said that merely because the direction was for an entail, they would execute that by decreeing a strict settle-

Blackburn v. Stables.

[1] 2 V. & B., 369.

ment." And in *Jervoise* v. *The Duke of Northumberland*,[1] Lord Eldon said:—"In marriage articles, the object of such settlement, the issue to be provided for, the intention to provide for such issue, and in short, all the considerations that belong peculiarly to them, afford *primâ facie* evidence of intent, which does not belong to executory trusts under wills. But I take it according to all the decisions, allowing for that an executory trust in a will is to be executed in the same way."[2] In the case of a will, the Court endeavours to carry out the intentions of the testator as apparent on the will, and is not necessarily bound to give technical words their strict signification; and if, therefore, the directions of the testator as to the disposition of the trust-estate show that he could not have intended the expressions to have their strict technical operation, the Court, in decreeing a settlement, will depart from the words in order to execute the intent.[3] Where a testator directs his trustees to settle or convey an estate without more, the Court is obliged to interfere and to point out the estate to be taken by the *cestui que trust*. But if a testator merely directs the purchase of an estate by his trustees, and himself declares the uses of the estate when purchased, the Court has no power to alter or modify his words;[4] it is only when something is left incomplete and executory by the author of the trust, that a Court of Equity will mould or modify the words in order to give effect to the intentions of the party. For, if the limitations of the trust-estate are definitely and finally declared by the instrument itself, that will be an executed trust, and it must be carried into execution as strictly and literally as if it were a limitation of the legal interest.[5]

LECTURE I.

Jervoise v. The Duke of Northumberland.

Will.

If the executory trust, which the testator has attempted to create, is one which is void for illegality, as where it violates the rule against perpetuities, the Court will carry out the testator's intention *cy prés*, that is, as nearly as possible, and will direct the property to be strictly settled.[6]

Cy prés.

[1] 1 Jac. & W., 574.

[2] See Sackville West v. Viscount Holmesdale, L. R., 4 E. & I., App., 543.

[3] 2 Jarm. Pow. Dev., 442; see Sackville West v. Viscount Holmesdale, L. R., 4 E. & I., App., 543.

[4] Austen v. Taylor, 1 Eden, 361; S. C., Amb., 376.

[5] Jervoise v. The Duke of Northumberland, 1 Jac. and W., 570; Bale v. Coleman, 1 P. Wms., 142; S. C., 2 Vern., 670; Papillon v. Voice, 2 P. Wms., 477; Douglas v. Congreve, 1 Beav., 59.

[6] Humberston v. Humberston, 2 Vern., 737; S. C, 1 P. Wms., 332.

LECTURE I.

Intention.

We have seen that the Court will endeavour to carry out the intentions of the author of the trust, and in so doing is not bound to give their strict meaning to technical expressions which may be used in the instrument creating the trust. Upon this principle of carrying the intentions of the testator into effect, the Court will endeavour to construe expressions which have no strict technical operation, and this whether the instrument of trust be a deed or will.[1]

But the expressions used must be directory and certain; mere precatory expressions, or words of recommendation, will not be enforced.[2]

General rules.

In conclusion of this subject, it may be stated generally for the guidance of trustees, that where an executory trust arises on marriage articles, whose object is to provide for the husband and wife, and their issue, the trustees will be justified in executing the trust by limiting the estate in strict settlement, although it would certainly be the more prudent course for them to obtain a declaration of the Court for their guidance even in these cases.

But where the trust is created by will, and the testator has not himself distinctly and accurately specified the limitations which are to be inserted, trustees could seldom or ever be advised to take upon themselves the responsibility of putting a construction on the direction of the testator by the execution of any particular settlement; this can be done with safety only under the sanction of the Court. And the same remark applies to executory trusts created by any voluntary deed or instrument operating *inter vivos.*

If a husband have entered into articles on his marriage, binding himself to make a particular provision for his wife and children, it will not be competent for the trustees of their own authority to accept any other provision in lieu of that contemplated by the articles; although they will be justified in instituting a suit for the purpose of bringing the propriety of such a substitution before the Court.[3]

[1] Woolmore *v.* Burrows, 1 Sim., 512; Lord Dorchester *v.* The Earl of Effingham, 3 Beav., 180; Bankes *v.* Le Despencer, 10 Sim., 576; Countess of Lincoln *v.* Duke of Newcastle, 12 Ves., 218; Lord Deerhurst *v.* Duke of St. Albans, 5 Mad., 232; Jervoise *v.* The Duke of Northumberland, 1 J. and W., 559; Blackburn *v.* Stables, 2 V. and B., 367.

[2] As to the limitations which will be directed, see Lewin on Trusts, 7th edn., pp. 102—118; Knight *v.* Knight, 3 Beav., 148, 177.

[3] *See* Hill on Trustees, 329, citing Cooke *v.* Fryer, V. C. Wigram, 19th Nov., 1844.

LECTURE I.

Subject-matter of trust.

The next point to consider after defining the different kinds of trusts, is, the property which may be made the subject of a trust. As a general rule it may be laid down, that every kind of property, whether moveable or immoveable, which may be legally transferred or disposed of, may be the subject of a trust. It is not necessary that the person creating the trust should have the legal estate,—that is to say, should be the absolute owner, for the equitable owner of property, or the person having the beneficial interest, may create a trust of such beneficial interest:[1] and a trust may be created of property which is not in the actual possession of the author of the trust, such as property to which he will become entitled on the death of a third person.[2]

In *Green* v. *Folgham*,[3] the sole possessor of a recipe for making a medicine assigned it, on the marriage of his daughter, to trustees, upon trust for her and her husband for their lives; and directed that, after their decease, it should be sold for the benefit of their children. The mother destroyed the recipe, and verbally communicated the contents to her eldest son for the benefit of his brothers and sisters. In a suit brought against him by some of the younger children, he was declared to hold the secret upon the trusts of the settlement, and was decreed to account for the profits made by him by the sale of the medicine after his mother's death: and as a sale was impracticable, an issue was directed to ascertain the value of the secret. In *Jenks* v. *Holford*,[4] Lord Northington, on an attempt being made to make a child bring some chemical recipes given to her by her father into hotchpot, said, he would not countenance these sorts of recipes, which he thought in most cases savoured of quackery, so as to put a value on them in Chancery; as for aught he knew a recipe to make mince pies or catch rats might be as valuable. If, however, the recipe is valuable, even though it is for a trivial matter, there does not seem to be any good reason why it should not be made the subject of a trust.

Trusts against policy of law.

If the policy of the law, as in the case of trusts for immoral purposes, or any Statutory enactment such as the provisions of the Indian Succession Act, X of 1865,

[1] Knight v. Bowyer, 23 Beav., 635; affirmed on appeal, 2 DeG. and J., 421.
[2] Hobson v. Trevor, 2 P. Wms., 191; Wright v. Wright, 1 Ves., 411.
[3] 1 S. & S., 398. [4] 1 Vern., 62.

LECTURE I.

s. 101, against perpetuities prevent the author of the trust from parting with the beneficial interest in favor of the intended *cestui que trust*, no valid trust can be created. I shall deal with the subject of trusts against the policy of the law more fully hereafter.

Title of honor.

No trust can be declared of a title of honor or of a peerage. These are from their very nature personal possessions, and belong only to the person to whom they are granted or on whom they descend, and cannot be held by one person upon trust for another.[1]

Trusts of immoveable property without the jurisdiction of a Court.

As a general rule, a Court of Justice has no control over immoveable property situate without the local limits of its jurisdiction. But a Court administering equity, as the Courts in this country are bound to do, may, where a person against whom relief is sought is within the jurisdiction, make a decree upon the ground of a contract or any equity subsisting between the parties respecting property situated out of the jurisdiction. The leading case on this point is that of *Penn* v. *Lord Baltimore*,[2] where specific performance was decreed of an agreement respecting lands in America.

Penn v. Lord Baltimore.

Act X of 1877, ss. 15, 16.

The Code of Civil Procedure, Act X of 1877, ss. 15, 16, provides, that—

"Every suit shall be instituted in the Court of the lowest grade competent to try it.

Subject to the pecuniary or other limitations provided by any law, suits

(*a*) for the recovery of immoveable property,

(*b*) for the partition of immoveable property,

(*c*) for the foreclosure or redemption of a mortgage of immoveable property,

(*d*) for the determination of any other right to, or interest in, immoveable property,

(*e*) for compensation for wrong to immoveable property,

(*f*) for the recovery of immoveable property under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

Provided that suits to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, when the relief sought *can be entirely obtained through his personal obedience*, be instituted either in the Court

[1] The Buckhurst Peerage, L. R., 2 App. Ca., 1. [2] 1 Ves., 444.

within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction he actually and voluntarily resides or carries on business, or personally works for gain.

Explanation.—In this section 'property' means property situate in British India.

This section does not apply to the High Courts in the exercise of their ordinary or extraordinary civil jurisdiction.[1] The jurisdiction of the High Courts of Calcutta, Bombay, and Madras, with regard to land without the limits of their ordinary original civil jurisdiction, is provided for by the Charter Act[2] and the Letters Patent granted under it. Section 9 of the Charter Act provides, that each of the High Courts to be established under the Act shall have such jurisdiction as Her Majesty may, by Letters Patent, grant and direct, subject, however, to such directions and limitations as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency-Towns as may be prescribed thereby. Section 12 of the Letters Patent provides that the High Court, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated, or in all other cases, if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the High Court, or if the defendant, at the time of the commencement of the suit, shall dwell or carry on business, or personally work for gain within such limits. The High Courts have jurisdiction, under this clause, to entertain suits for land, whether the land is situated wholly, or in part only, within the local limits of their ordinary original jurisdiction, leave of the Court having been first obtained in the latter case.[3] But if leave has not been obtained they have no jurisdiction, even though the parties are personally subject to the jurisdiction.[4] Thus the Courts

High Courts' Charter.

Letters Patent.

Suits for land.

[1] See Act X of 1877, s. 638. [2] 24 and 25 Vict., c. 104.

[3] Prasannamayi Dasi *v.* Kadambini Dasi, 3 B. L. R., O. C., 85; S. M. Jagadamba Dasi *v.* S. M. Padamani Dasi, 6 B. L. R., 686; Sreenath Roy *v.* Cally Doss Ghose, I. L. R., 5 Calc., 82.

[4] The East Indian Railway Co. *v.* The Bengal Coal Co., I. L. R., 1 Calc., 95; The Delhi and London Bank *v.* Wordie, *ib.*, 249.

LECTURE I.

have jurisdiction to decree foreclosure of lands partly within and partly without the limits of their Original Civil Jurisdiction, where leave has been obtained;[1] but not if no leave has been granted,[2] suits for foreclosure being suits 'for land.'[3] So also suits for redemption of mortgages,[4] and for sale of mortgaged property in satisfaction of the mortgage debt,[5] are suits for land.[6]

But every suit having reference to land is not necessarily a suit 'for land,' and the Courts have jurisdiction if the object of the suit is not to recover possession of the land or to deal with the land itself;[7] and it has been held, that a suit to declare that a person resident in Calcutta holds lands in the mofussil subject to certain trusts, is not 'a suit for land.'[8] A suit *in personam* can be entertained if the defendant resides within the jurisdiction, as for example, a suit to restrain a nuisance.[9]

Foundation of jurisdiction.

In order to found the jurisdiction of the Court some one of three circumstances must exist; either the defendant must be within the jurisdiction of the Court, or the subject-matter in dispute must be situated within the jurisdiction of the Court, or the contract must have been entered into within the jurisdiction of the Court.[10] The fact that the defendant may be served with the summons, although he is residing abroad,[11] does not extend the jurisdiction of the Court.[12] In *Edwards* v. *Warden*,[13] a suit was instituted against four trustees in India of a fund in India, and one formal defendant in England, to recover

[1] The Bank of Hindustan, China, and Japan *v.* Nundolall Sen, 11 B. L. R., 301.

[2] Juggodumba Dossee *v.* Puddomoney Dossee, 15 B. L. R., 318, 328.

[3] Bebee Jaun *v* Meerza Mahomed Hadee, 1 Ind. Jur., 40.

[4] Lalmoney Dossee *v.* Judoonath Shaw, 1 Ind. Jur., 319.

[5] Leslie *v.* The Land Mortgage Bank, 18 W. R., 269.

[6] But see Yenkoba *v.* Rambhaji, 9 Bom. H. C. Rep., 12.

[7] Juggodumba Dossee *v.* Puddomoney Dossee, 15 B. L. R., 318; East Indian Railway Co. *v.* The Bengal Coal Co., I. L. R, 1 Calc., 95; The Delhi and London Bank *v.* Wordie, I. L. R, 1 Calc., 249; Kellie *v.* Fraser, I. L. R., 2 Calc., 445; Juggernauth Doss *v.* Brijnath Doss, I. L. R., 4 Calc., 322.

[8] Bagram *v.* Moses, 1 Hyde, 284; see also Juggodumba Dossee *v.* Puddomoney Dossee, 15 B. L R., 318; Broughton *v.* Mercer, 14 B. L. R., 442; Treepoora Soondery Dossee *v.* Debendronath Tagore, I. L. R., 2 Calc., 52.

[9] Rajmohun Bose *v.* The East Indian Railway Co., 10 B. L. R., 241.

[10] Cookney *v.* Anderson, 31 Beav., 452, 642.

[11] Act X of 1877, s. 89.

[12] *Ibid*, and see Maunder *v.* Lloyd, 2 J. and H., 718.

[13] L. R., 9 Ch., 495.

money payable in England. The trustees were served out of the jurisdiction, appeared and answered, and entered into evidence; and it was held, that as they had not demurred, or pleaded, or moved to discharge the order for service, the Court of Chancery had jurisdiction to determine the questions between the parties.

Court of equity acts *in personam* and not *in rem*.

The Court, in enforcing equitable rights over, or titles to land situated without the limits of its jurisdiction, operates upon the conscience of the defendant or *in personam*,[1] not upon the property or *in rem*, and the decree, therefore, does not directly affect the property;[2] but a trust of such land is supported against a trustee resident within the jurisdiction by a decree operating *in personam*.[3] It is immaterial whether the lands are situated within the limits of the British empire or are in a foreign country. The Court of Equity will exercise its authority if the defendant is within its jurisdiction[4] In *Angus* v. *Angus*,[5] a bill was brought for possession of lands in Scotland, and for a discovery of the rents and profits, deeds and writings, and fraud in obtaining the deeds was charged. The defendant pleaded the 19th article of the Treaty of Union, and that the lands in question, and the matter prayed by the bill, were out of the jurisdiction of the Court. Lord Hardwicke said:—"This Court acts upon the person as to the fraud and discovery, therefore the plea must be overruled. To have made this a good plea, there ought to have been a further averment, that the defendant was resident in Scotland. This had been a good bill as to fraud and discovery if the lands had been in France, if the persons were resident here; for the jurisdiction of the Court as to frauds is upon the conscience of the party."[6] Of course the Court of one country has no jurisdiction over the Court of another. In *Lord Cranstown* v. *Johnston*,[7] the plaintiff sued to set aside a sale made in pursuance of a decree fraudulently obtained in the absence of the debtor by the creditor, who himself purchased the property at the execution-sale. The property was situated

Land may be in a foreign country.

Angus v. Angus.

Lord Cranstown v. Johnston.

[1] Toller v. Carteret, 2 Vern., 494.
[2] Earl of Kildare v. Eustace, 1 Vern., 421; Roberdeau v. Rous, 1 Atk., 543; Carteret v. Petty, 2 Sw., 323n.
[3] Penn v. Lord Baltimore, 1 Ves., 454
[4] Earl of Kildare v. Eustace, 1 Vern., 121.
[5] 1 West, 23.
[6] *See* Scott v. Nesbitt, 14 Ves., 438.
[7] 3 Ves., 170.

LECTURE I.

in the Island of St. Christopher in the West Indies. Sir R. P. Arden, M. R., said:—"Upon the whole it comes to this,—that, by a proceeding in the Island, an absentee's estate may be brought to sale, and for whatever interest he has, without any particular upon which they are to bid; the question is, whether the Court will permit the transaction to avail to that extent. It is said, this Court has no jurisdiction, because it is a proceeding in the West Indies. It has been argued very sensibly that it is strange for this Court to say, it is void by the laws of the Island, or for want of notice. I admit I am bound to say that, according to those laws, a creditor may do this. To that law he has had recourse, and wishes to avail himself of it: the question is, whether an English Court will permit such an use to be made of the law of that Island or of any other country. It is sold, not to satisfy the debt, but in order to get the estate, which the law of that country never could intend, for a price much inadequate to the real value, and to pay himself more than the debt for which the suit was commenced, and for which only the sale could be holden. It was not much litigated that the Courts of Equity here have an equal right to interfere with regard to judgments or mortgages upon lands in a foreign country as upon lands here. Bills are often filed upon mortgages in the West Indies. The only distinction is, that this Court cannot act upon the land directly, but acts upon the conscience of the person living here.[1] Those cases clearly show that, with regard to any contract made, or equity, between persons in this country respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction as if they were situated in England. Lord Hardwicke lays down the same doctrine.[2] Therefore, without affecting the jurisdiction of the Courts there, or questioning the regularity of the proceedings as in a Court of Law, or saying that this sale would have been set aside either in law or equity there, I have no difficulty in saying, which is all I have to say, that this creditor has availed himself of the advantage he got by the nature of those laws, to proceed behind the back of the

[1] Archer *v.* Preston, Lord Ardglasse *v.* Muschamp, Lord Kildare *v.* Eustace, 1 Eq. Abr., 1; 1 Vern., 75, 135, 419.

[2] 3 Atk., 589.

debtor upon a constructive notice which could not operate to the only point to which a constructive notice ought, that there might be actual notice without wilful default: that he has gained an advantage, which neither the law of this nor of any other country would permit. I will lay down the rule as broad as this: this Court will not permit him to avail himself of the law of any other country to do what would be gross injustice."

Acting upon these principles, the Court of Chancery in England has decided questions relating to trusts of lands in Ireland,[1] in the Island of Sark,[2] in South America,[3] and in the West Indies.[4] It has ordered a sale of lands abroad,[5] and has given relief against a fraudulent conveyance.[6] In *Paget* v. *Ede*,[7] it was held, that a foreclosure decree being a decree *in personam* depriving the mortgagor of his personal right to redeem, the Court had jurisdiction to make such a decree in respect of a mortgage between an English mortgagor and mortgagee of land in one of the colonies.

Privity.

There must be a privity between the plaintiff and defendant, and it must appear that some contract or personal obligation has been incurred moving directly from the one to the other.[8]

Injunction restraining proceeding by other Courts.

The jurisdiction of the Court is founded like all other jurisdiction of the Court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom the order is made being within the power of the Court. And, acting upon the foregoing principles, it can restrain the party within the limits of its jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance or other act *in pais*, or the instituting or prosecution of an action in a foreign Court.[9]

And therefore the Court of Chancery in England has restrained persons within the jurisdiction from suing in

[1] Earl of Kildare *v.* Eustace, 1 Vern., 421; Cartwright *v.* Pettus, 2 Ch. Ca., 214; Earl of Ardglasse *v.* Muschamp, 1 Vern., 75.
[2] Toller *v.* Carteret, 2 Vern., 495.
[3] Cood *v.* Cood, 33 Beav., 314.
[4] Lord Cranstown *v.* Johnston, 3 Ves., 182.
[5] Roberdeau *v.* Rous, 1 Atk., 543.
[6] Earl of Ardglasse *v.* Muschamp, 1 Vern., 75.
[7] L. R., 18 Eq., 118.
[8] Norris *v.* Chambres, 29 Beav., 246—254.
[9] Lord Portarlington *v.* Soulby, 3 M. & K., 108.

LECTURE I.

the Ecclesiastical Court,[1] the Admiralty Court,[2] in the Courts in Ireland,[3] Scotland,[4] and the Colonies,[5] and has restrained a defendant from taking possession.[6]

If, however, a contract relating to land situated out of the jurisdiction be one which the *lex loci rei sitae* renders incapable of fulfilment, the Court will not enforce the contract against the proceeds of a sale of such land coming to the possession of parties within the jurisdiction, though they take such proceeds bound by the same equities as affected the party to the contract under whom they claim.[7]

The decree of the Court does not, as we have seen, affect the property directly. It is a personal decree ordering the defendant to do certain things. If he neglects or refuses to obey these orders, he can be imprisoned for an indefinite period for contempt of Court, and his property within the jurisdiction can be seized, and thus "his conscience is operated upon." If, however, he is able to evade the process of the Court for arrest and has no property in the country which can be seized, the decree is of course practically useless.[8]

Trusts of moveable property abroad.

Moveable property has no locality, but is subject to the law which governs the person of the owner. Accordingly, moveable property abroad belonging to a British subject may become the object of a trust, which will be recognized in this country.[9]

Object must be lawful.

I shall now deal with the object for which the trust is created. We have seen already, *ante*, p. 19, that trusts may be divided into lawful and unlawful, and that all lawful trusts may be enforced by a Court of Equity, and that, as a rule it may be laid down, that a trust is lawful until the contrary is shown; and that where a trust is unlawful and fraudulent, a Court of Equity will remain neutral, and

[1] Hill *v.* Turner, 1 Atk., 516; Sheffield *v.* The Duchess of Buckinghamshire, 3 M. and K., 628.

[2] Blad *v.* Bamfield, 3 Swanst., 604; Jarvis *v.* Chandler, 1 T. & R., 319.

[3] Lord Portarlington *v.* Soulby, 3 M. & K., 104; Booth *v.* Leycester, 1 Keen, 519.

[4] Kennedy *v* Earl of Cassilis, 2 Swanst., 313; Innes *v.* Mitchell, 4 Drewry, 57.

[5] Bunbury *v.* Bunbury, 1 Beav., 318.

[6] Cranstown *v.* Johnston, 5 Ves., 278; Hope *v.* Carnegie, L. R., 1 Ch., 320.

[7] Waterhouse *v.* Standfield, 9 Hare, 234; 10 Hare, 254; Norris *v.* bres, 29 Beav., 246.

[8] *See* Norris *v.* Chambres, 29 Beav., 246, 253.

[9] Hill on Trustees, 3; Hill *v.* Reardon, 2 Russ., 608.

will neither enforce the trust nor relieve the person creating it, unless the illegal purpose fails to take effect. In considering whether the object of the trust is one permitted by the law, the general rule to be followed is, that the intention of the author of the trust is to be carried into effect, where it is not against good policy;[1] "it is the intention of the party that creates and governs uses and trusts,"[2] "a trust is created by the contract of the party, and he may direct it as he pleaseth."[3] "What the Court looks at in all charities" (and the rule applies equally to all other trusts) said Romilly, M. R.,[4] "is the original intention of the founder, and apart from any question of illegality and various other questions, this Court carries into effect the wishes and intentions of the founder of the charity: and where it sees that those intentions have not been carried into effect, it rectifies the existing administration of the charity for that purpose. If it cannot carry them into effect specifically, it carries them into effect as nearly as may be, and with as close a resemblance to them as it can." This rule has been applied to trusts created by Hindus.[5]

General rule for ascertaining whether trust lawful.

In considering whether the object of a trust is legal or not, it will be useful to bear in mind the provisions of s. 23 of the Indian Contract Act:—

Indian Contract Act, s. 23.

"The consideration or object of an agreement is lawful, unless—

it is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies injury to the person or property of another; or

the Court regards it as immoral or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Illustrations.

(*a.*) *A* agrees to sell his house to *B* for 10,000 rupees. Here, *B's* promise to pay the sum of 10,000 rupees is the consideration for

[1] Burgess *v.* Wheate, 1 Eden, 195.
[2] The Attorney-General *v.* Sands, Hardres, 494, *per* Lord Hale.
[3] Pawlett *v.* The Attorney-General, Hardres, 469, *per* Lord Hale.
[4] Attorney-General *v.* Dedham School, 23 Beav., 355.
[5] Jatindra Mohan Tagore *v.* Ganendra Mohan Tagore, 9 B. L. R., 377.

LECTURE I.

A's promise to sell the house, and *A's* promise to sell the house is the consideration for *B's* promise to pay the 10,000 rupees. These are lawful considerations.

(*b.*) *A* promises to pay *B* 1,000 rupees at the end of six months, if *C*, who owes that sum to *B*, fails to pay it. *B* promises to grant time to *C* accordingly. Here the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.

(*c.*) *A* promises for a certain sum paid to him by *B* to make good to *B* the value of his ship, if it is wrecked on a certain voyage. Here, *A's* promise is the consideration for *B's* payment, and *B's* payment is the consideration for *A's* promise, and these are lawful considerations.

(*d.*) *A* promises to maintain *B's* child, and *B* promises to pay *A* 1,000 rupees yearly for the purpose. Here, the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(*e.*) *A*, *B*, and *C* enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(*f.*) *A* promises to obtain for *B* an employment in the public service, and *B* promises to pay 10,000 rupees to *A*. The agreement is void, as the consideration for it is unlawful.

(*g.*) *A*, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for *B* a lease of land belonging to his principal. The agreement between *A* and *B* is void, as it implies a fraud by concealment by *A* on his principal.

(*h.*) *A* promises *B* to drop a prosecution which he has instituted against *B* for robbery, and *B* promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(*i.*) *A's* estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. *B*, upon an understanding with *A*, becomes the purchaser, and agrees to convey the estate to *A* upon receiving from him the price which *B* has paid. The agreement is void, as it renders the transaction in effect a purchase by the defaulter, and would so defeat the object of the law.

(*j.*) *A*, who is *B's* mukhtar, promises to exercise his influence, as such, with *B* in favour of *C*, and *C* promises to pay 1,000 rupees to *A*. The agreement is void, because it is immoral.

(*k.*) *A* agrees to let her daughter to hire to *B* for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code."

Trusts contrary to policy of law or founded upon illegal contract void.

It appears, therefore, that if the object of the trust is contrary to the policy of the law, or if it is founded upon an illegal or immoral contract, it will be void.[1] For example, if the trust is based upon a transaction forbidden by the law,[2] or is intended as a fraud upon an act of the Legislature,[3] such for instance, as a fictitious and fraudulent conveyance for the purpose of obtaining a property qualification to enable the grantee to vote at elections,[4] it will be void. In *May* v. *May*,[5] a conveyance of property by a father to his son, to give him a qualification to vote, was held not invalid, but a bounty. In *Groves* v. *Groves*,[6] property was purchased by one person and conveyed to another in order to give the latter a vote at Parliamentary elections, and the Court refused to assist the purchaser, and a suit by him, seeking to make the grantee a trustee, was dismissed.[7] So an assignment of the half pay of an officer in the army is bad. For half pay is intended by the State to provide decent maintenance for experienced officers, both as a reward for their past services, and to enable them to preserve such a situation that they may always be ready to return into actual service. It materially differs, therefore, from the general case of expectancies, which may be assigned; for in the latter case, no public interest is thwarted. Thus a pension is equally uncertain as half pay; but as no future benefit is meant to arise to the State from granting it, a material difference arises between them.[8] So also an attempt by a Hindu to create any estate,—such for instance, as an estate tail,—which is unknown and repugnant to the Hindu law, is void.[9]

Assignment of half pay.

Trusts for future illegitimate children.

Among trusts which, according to English law, are void as being contrary to public policy, may be mentioned those to provide for future illegitimate children. Such trusts are held to be void, because they tend to encourage immorality. The law on this point, so far as regards per-

[1] *See* Attorney-General *v.* Pearson, 3 Mer., 399; Hamilton *v.* Waring, 2 Bligh., 209; Earl of Kingston *v.* Lady Pierepont, 1 Vern., 5.

[2] *Ex parte* Dyster, 1 Mer., 172. [3] Curtis *v.* Perry, 6 Ves., 739.

[4] Childers *v.* Childers, 3 K and J., 310; 1 De G and J., 482; Ashworth *v.* Hopper, L. R., 1 C. P. D., 178.

[5] 33 Beav., 81. [6] 3 Y. & J., 163.

[7] *See* Rex *v.* Portington, 1 Salk., 162; Adlington *v.* Cann, 3 Atk., 151.

[8] Stone *v.* Lidderdale. 2 Anst., 533.

[9] Soorjeemoney Dossee *v.* Denobundoo Mullick, 6 Moo. I. A., 526; Jatindra Mohan Tagore *v.* Ganendra Mohan Tagore, 9 B L R., 377.

LECTURE I.

sons subject to English law, will be found in the case of *Occleston* v. *Fullalove*.[1]

There a testator, who had gone through the ceremony of marriage with Margaret Lewis, his deceased wife's sister, who had two daughters, Catherine and Edith, by him, and who was *enceinte* with a third at the date of the will, gave a moiety of his property to trustees in trust for Margaret Lewis for life, and after death, for his reputed children Catherine and Edith, and all other children which he might have or be reputed to have by Margaret Lewis, then born or thereafter to be born. The third child, Margaret, was born before the testator's death, and was acknowledged by him as his child. Wickens, V. C., considering that the case was governed by the decision in *Pratt* v. *Mathew*,[2] held that Margaret was not entitled to share in the testator's property. On appeal, Lord Selborne, L. C., differing from James and Mellish, L. JJ., agreed with the decision of Wickens, V. C., thinking that he was bound by the authorities. The Lord Justices, however, held, that there was nothing in the authorities to prevent a child coming into existence between the date of execution of the will and the death of the testator from taking under the will, and that Margaret was entitled to share.

The principle of the decision is, that a gift by a testator or testatrix to one of his or her children by a particular person, is perfectly good, if the child has acquired the reputation of being such a child as described in the will before the death of the testator or testatrix.[3]

Trust for illegitimate children in being, or *en ventre sa mère*.

But a trust for an illegitimate child in being, or *en ventre sa mère*, at the time of the creation of the trust, is good if the child is clearly designated as the object of the gift.[4] "In order," said Stuart, V. C.,[5] "that any legatee—whether the legacy be to a class or to an individual—may take, it is necessary that the person or the class should be clearly described. Where a gift is made to a child or to children as a class, the natural and proper meaning of the word 'child' or 'children' is legitimate child or legitimate children; but if the object of the gift is clearly described and clearly ascertainable from the words of the will, it matters nothing

[1] L. R., 9 Ch., 147. [2] 22 Beav, 328.

[3] *In re* Goodwin's Trust, L. R., 17 Eq., 346. See also Ellis *v.* Houston, L. R., 10 C. D., 236; Megson *v.* Hindle, L. R., 15 C. D., 198.

[4] Medworth *v.* Pope, 27 Beav., 71.

[5] Holt *v.* Sindrey, L. R., 7 Eq., 173.

whether the object of the gift be legitimate or illegitimate, because an illegitimate child, or a number of illegitimate children as a class, if properly described, may be a legatee or legatees just as well as legitimate children."[1] It is merely a question of designation.[2] The principle which may fairly be extracted from the cases upon the subject is this, the term 'children' in a will *primâ facie* means legitimate children; and if there is nothing more in the will, the circumstance that the person whose children are referred to has illegitimate children will not entitle those illegitimate children to take. But there are two classes of cases in which that *primâ facie* interpretation is departed from. One class of cases is, where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest. The other class of cases is, where there is, upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its *primâ facie* meaning of legitimate children, but according to a meaning which would apply to, and would include, illegitimate children.[3] In order to interpret the words of the will, it is always not only allowable, but it is the duty of the Court, to obtain the knowledge which the testator had of the state of his family, so as to ascertain whether the testator intended illegitimate children to take under general expressions used in the will.[4]

Trust forbidden by law.

A trust for a purpose which is forbidden by law is unlawful. As an example may be mentioned section 13 of Beng. Regulation of 1793, which forbids Collectors from conferring on their public officers any private trust relating to their personal concerns.[5]

Trusts postponing enjoyment of property or restraining alienation.

Another class of trusts, which are void as being against public policy, are those in which an attempt is made to postpone the enjoyment of property for an indefinite period, or to prevent the alienation of property for ever. Such trusts are considered to be injurious to the good of

[1] See also Clifton *v.* Goodbun, L. R., 6 Eq., 278; Savage *v.* Robertson, L. R., 7 Eq., 176. [2] Lepine *v.* Bean, L. R., 10 Eq., 160.

[3] Hill *v.* Crook, L. R., 6 E. & I., App., 265, *per* Lord Cairns. See also *In re* Brown's Trust, L. R., 16 Eq., 239.

[4] Hill *v.* Crook, L. R., 6 E. & I, App., 265; Dorin *v.* Dorin, L. R., 7 E. & I., App, 568.

[5] See also the Indian Contract Act, IX of 1872, ss. 26—28, which declares agreements in restraint of marriage, trade or legal proceedings to be void.

LECTURE I.

the State, and will not be enforced.[1] "A perpetuity," said Lord Guildford,[2] "is a thing odious in law, and destructive to the commonwealth: it would put a stop to commerce, and prevent the circulation of the riches of the kingdom; and therefore is not to be countenanced in equity."[3]

In England the rule is, that no remainder can be given to the unborn child of a living person for his life, followed by a remainder to any of the issue of such unborn person, the latter of such remainders being absolutely void.[4] The effect of this rule is to forbid the tying up of lands for a longer period than can elapse until the unborn child of some living person shall come of age; that is, for the life of a party now in being, and for twenty-one years after, with a further period of a few months during gestation, supposing the child should be of posthumous birth. In analogy, therefore, to the restriction thus imposed on the creation of contingent remainders, the law has fixed the following limits to the creation of executory interests: it will allow any executory estate to commence within the period of any fixed number of now-existing lives, and an additional term of twenty-one years; allowing further for the period of gestation, should gestation actually exist. This additional term of twenty-one years may be independent or not of the minority of any person to be entitled;[5] and if no lives are fixed on, then the term of twenty-one years only is allowed.[6] By the Statute 39 and 40 Geo. III, c. 98, the accumulation of income is forbidden for any longer term than the life of the grantor or settlor, or twenty-one years from the death of any such grantor, settlor, devisor, or testator, or during the minority of any person living, or *en ventre sa mère*, at the death of the grantor, devisor or testator, or during the minority only of any person who, under the settlement or will, would for the time being, if of full age, be entitled to the income so

Accumulation.

[1] See the Duke of Norfolk's case, 3 Ch. Ca., 20, 28, 35, 48.

[2] Duke of Norfolk *v.* Howard, 1 Vern., 164.

[3] For instances of attempt to create perpetuities by the creation of terms, see Floyer *v.* Bankes, L. R., 8 Eq., 115; Sykes *v.* Sykes, L. R., 13 Eq, 56.

[4] Hay *v.* The Earl of Coventry, 3 T. R., 86; Brudenell *v.* Elwes, 1 East, 452; Cole *v.* Sewell, 2 H. L. C., 186; Moneypenny *v.* Dering, 2 D. M. G., 145.

[5] Cadell *v* Palmer, 7 Bligh. N. S., 202.

[6] Williams on Real Property, 9th Ed., 305.

directed to be accumulated. The law was the same as regards trusts created by will in India up to the passing of the Indian Succession Act, X of 1865. By section 101 of that Act it is provided as follows :—

"No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

Illustrations.

(*a.*) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, and after *B's* death, to such of the sons of *B* as shall first attain the age of 25. *A* and *B* survive the testator. Here the son of *B*, who shall first attain the age of 25, may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of *A* and *B*; and the vesting of the fund may thus be delayed beyond the lifetime of *A* and *B*, and the minority of the sons of *B*. The bequest after *B's* death is void.

(*b.*) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, and after *B's* death to such of *B's* sons as shall first attain the age of 25. *B* dies in the lifetime of the testator, leaving one or more sons. In this case the sons of *B* are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

(*c.*) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, with a direction that, after *B's* death, it shall be divided amongst such of *B's* children as shall attain the age of 18; but that if no child of *B* shall attain that age, the fund shall go to *C*. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of *B*, a person living at the testator's decease. All the bequests are valid.

(*d.*) A fund is bequeathed to trustees for the benefit of the testator's daughters, with a direction that if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. Any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed, must vest not later than 18 years from the death of the daughter whose share it was. All these provisions are valid."

The rule in this section, it will be seen, does away altogether with the absolute term of twenty-one years, and,

LECTURE I.

owing to the definition of minority, reduces to eighteen years (or to eighteen and the period of gestation when the person in being is unborn) the twenty-one years which went to make up the period according to the English law.[1] This section of the Succession Act[2] applies to Hindus, Jains, Sikhs, and Buddhists.

Perpetuities among Hindus.

According to Hindu law, a perpetuity, save in the case of religious and charitable endowments, is illegal. Thus trusts to accumulate property for ninety-nine years,[3] to accumulate until the fund reached three lakhs,[4] and to postpone enjoyment until the testator's children reached the age of twenty-one,[5] have been held to be void; and the rule cannot be avoided by means of a colourable dedication to an idol.[6] The law of wills among Hindus is analogous to the law of gifts; a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must either in fact or in contemplation of law be in existence at the death of the testator, and therefore a gift to an unborn child, except in the case of an infant in the womb, or an adopted son, is void.[7] And what cannot be done by a gift, cannot be done by the intervention of a trust.[8] So a trust for the maintenance of a family for ever is void.[9] But a father may delay the rights of his issue by interposing a valid estate previous to theirs.[10]

Restraint on alienation.

It is against the policy of the law to permit a trust to be created with a condition restraining alienation of the interests of the *cestui que trust* generally. For instance, a devise to trustees upon trust for daughters for their "separate and inalienable use" is too remote and void.[11] And

[1] Stokes's Succession Act, 82. [2] Act XXI of 1870, s. 2.

[3] Kumara Asima Krishna Deb *v.* Kumara Kumara Krishna Deb, 2 B. L. R., O. C., 11.

[4] S. M. Krishnaramani Dasi *v.* Ananda Krishna Bose, 4 B. L. R., O. C., 231.

[5] S. M. Bramamayi Dasi *v.* Jages Chandra Dutt, 8 B. L. R., 400.

[6] Promotho Dossee *v.* Radhika Persaud Dutt, 14 B. L. R., 175.

[7] Jatindra Mohan Tagore *v.* Ganendra Mohan Tagore, 9 B. L. R., 377; Soudaminey Dossee *v* Jogesh Chunder Dutt, I. L. R., 2 Calc., 262; Bhoobun Mohini Debia *v* Hurish Chunder Chowdhry, I. L. R., 4 Calc., 27; Kherodemoney Dossee *v.* Doorgamoney Dossee, I. L. R., 4 Calc., 455; Chundramoney Dossee *v.* Motilal Mullick, 5 Calc., 496.

[8] Krishnaramani Dasi *v.* Ananda Krishna Bose, 4 B. L. R., O. C., 231; Rajender Dutt *v.* Sham Chand Mitter, I. L. R., 6 Calc., 106; Kally Prosono Mitter *v.* Gopee Nauth Kur, 7 Calc., 241.

[9] Chundramoney Dossee *v.* Motilal Mullick, 5 Calc., 496.

[10] Hurrosoondery *v.* Cowar Kistonauth, Fult., 393.

[11] Armitage *v.* Coates, 35 Beav., 1; *In re* Cunynghame's Settlement, L. R., 11 Eq., 324; *In re* Teague's Settlement, L. R., 10 Eq., 564.

such a restriction is void by both Hindu and Mahomedan law. Thus, when a father, during his son's minority, gave certain property to him, and on delivery of possession got from him a document stipulating that he would not alienate the property, and that, on his death, the property should return to the father,—it was held, that the condition against alienation was absolutely void.[1] So, trusts prohibiting or restricting the right of partition are void.[2] Alienation to a particular person may be restrained, but alienation generally, being repugnant to the estate, cannot.[3] So a trust may be created in favour of a man, to determine and go over on his bankruptcy,[4] but a trust to continue after bankruptcy would be void.[5] For instance, a proviso in a will that the *cestui que trust* shall not have power to sell, mortgage or anticipate the income of the trust fund, will not prevent the assignee from taking the income on the bankruptcy of the *cestui que trust.*[6] Such a condition is inconsistent with, and repugnant to, the gift. It is one of the incidents of property that it shall vest in the assignees of a bankrupt for the benefit of his creditors, and this incident cannot be taken away by the author of the trust.[7] So the right of alienation is one of the incidents of the absolute ownership of property; and therefore, if an absolute gift without the intervention of trustees is followed by a condition restricting the right of alienation, the condition is wholly void.[8]

Condition restraining alienation after absolute gift.

Where trustees have a discretion as to the manner of the application of the trust-fund for the benefit of the *cestui que trust,* but no power to apply it otherwise than for his benefit during his life, the discretion is a discretion subject to the incidents of property, and is consequently terminable upon the insolvency of the *cestui que*

Insolvency.

[1] Nabob Amiruddaula Muhammad *v.* Nateri Srinivasa Charlu, 6 Mad. H. C. R., 356. See Kumara Asima Krishna Deb *v.* Kumara Kumara Krishna Deb, 2 B. L R., O. C, 25; Nitai Charan Pyne *v.* S. M. Ganga Dasi, 4 B. L. R., O. C., 26*n*; Promotho Dossee *v.* Radhika Pershaud Dutt, 14 B. L. R., 175.

[2] Mayne, §§ 328, 356, 410.

[3] Co. Litt., ss 360, 361, 362.

[4] Brandon *v.* Robinson, 18 Ves., 433.

[5] Graves *v.* Dolphin, 1 Sim., 66

[6] Green *v.* Spicer, 1 R. & M., 395; Snowdon *v.* Dales, 6 Sim., 524.

[7] Brandon *v.* Robinson, 18 Ves., 433; Bird *v.* Johnson, 18 Jur., 976.

[8] Bradley *v.* Peixoto, 3 Ves., 324; Ross *v.* Ross, 1 Jac & W., 154; Ware *v.* Cann, 10 B. and C., 433; Hood *v.* Oglander, 34 Beav., 513; Hunt-Foulston *v.* Furber, L R., 3 C. D., 285.

LECTURE I.

trust. The life-interest enures for the benefit of the creditors, and any attempt to continue the insolvent in the enjoyment of the property is in fraud of the law.[1]

But where a testatrix bequeathed a share of her residue in trust for her nephew for life, and by a codicil, after reciting that her nephew had become bankrupt and insane, she directed the trustees to apply during his life the whole or such part of the interest of the fund, at such times, in such proportions, and in such manner, for the maintenance and support of her nephew, and for no other purpose whatsoever, as they, in their discretion, should think most expedient,—it was held, that the nephew's assignees were not entitled to any portion of the provision made for him. The cases of *Green* v. *Spicer*,[2] *Snowdon* v. *Dales*,[3] and *Piercy* v. *Roberts*[4] were distinguished, on the ground, that in those cases the gift took effect before the donee became bankrupt, and the income of the fund was either to be paid to the donee or to be applied for his benefit generally. Whereas in the case now under consideration, the trustees were only to apply such sums as they thought fit for maintenance and support, there was a trust created for the mere special purpose of supporting and maintaining the nephew, and under such a trust the assignees could take no interest.[5]

If a trust is created for the benefit of two or more persons, and one becomes bankrupt or insolvent, the assignee will be entitled only to his proportionate part. In *Page* v. *Way*[6] freehold and personal property belonging to the husband was conveyed to trustees upon trust to receive the rents and profits, "and pay and apply the same when received, unto or for the maintenance and support of the husband, his wife, and children, or otherwise if the trustees should think proper, to permit the same to be received by the husband during his life, without power to charge or anticipate." The husband became bankrupt, and in a suit by the assignees claiming the whole income of the trust-property,—it was held, that a trust had been created for the maintenance and support of the wife and children out of the property during the husband's life. Lord Langdale, M. R., said:—"I am of opinion that, so long as the wife and children were main-

[1] Green *v.* Spicer, 1 R. and M., 395; Piercy *v.* Roberts, 1 M. and K., 4; Snowdon *v.* Dales, 6 Sim., 524; Younghusband *v.* Gisborne, 1 Coll., 400.
[2] 1 R. and M., 395. [3] 6 Sim., 524. [4] 1 M. and K., 4.
[5] Twopeny *v.* Peyton, 10 Sim., 487. See *Re* Sanderson's Trust, 3 K. and J., 497. [6] 3 Beav., 20.

tained by the husband, the trustees had a discretion to give him the whole income, but that it was their duty to see that the wife and children were maintained: The assignees take everything subject to what is proper to be allowed for the maintenance of the wife and children." Again, where property was vested in trustees upon trust to pay the rents and profits to a certain person for life, provided that, if he became bankrupt, the trustees should apply the rents and profits in or towards the maintenance, clothing, lodging, and support of the *cestui que trust*, and his then or any future wife and his children, or any of them, as the trustees should, in their discretion, think fit,—it was held, on the bankruptcy of the *cestui que trust*, that his life-estate was forfeited at the time of his discharge,—that, from the date of the vesting order to the time of the discharge, the rents and profits of the estate belonged to the assignee; that, upon the discharge taking place, the discretionary powers given to the trustees by the settlement might be exercised by them in favour of the insolvent, his wife, and children collectively, or in favour of any of those persons to the exclusion of the others,—and that to whatever extent the power might be exercised in favour of the insolvent, the benefit which he would take by the appointment would vest in the assignee.[1]

Again, where a testator bequeathed his residuary estate to trustees, and, after making a provision out of it, for the benefit of his son and for his life, and, after the son's death, for his wife and children, directed that, if his son should assign or charge the interest to which he was entitled for life, or attempt or agree to do any act whereby the same, or any part thereof, might, if the absolute property thereof were vested in him, be forfeited to, or become vested in, any person or persons, then the trustees should pay and apply the said interest for the maintenance and support of his son and of any wife and child or children he might have, as the trustees in their discretion should think fit,—it was held, on the bankruptcy of the son, that the trust for the benefit of the son, his wife, and children was valid, and that the assignees were not entitled to any part of the provision. Shadwell, V. C., said:—"There is nothing in point of law to invalidate such a gift that I am aware

[1] Lord *v.* Burn, 2 Y. and C. C. C., 98. See also Holmes *v.* Penney, 3 K. and J., 90.

LECTURE I.

of. It does not follow that anything was of necessity to be paid; but the property was to be applied; and there might have been a maintenance of the son, and of the wife, and of the children, without their receiving any money at all. For instance, the trustees might take a house for their lodging, and they might give directions to tradesmen to supply the son and the wife and the children with all that was necessary for maintenance: and, therefore, my opinion is, that I am not at liberty to take this as a mere gift for the benefit of the son simply; but it is a gift for his benefit in the shape of maintenance and support of himself jointly with his wife and children: and if that is the true construction of the gift in question, the result is, that the assignees are not entitled to anything."[1] In *Kearsley* v. *Woodcock*,[2] Wigram, V. C., in a similar state of circumstances said, that it was not of necessity that any part of the trust-funds, under such a gift, must be applicable for the separate benefit of the bankrupt; the whole property might not be more than sufficient for the support and maintenance of the wife and children; and the benefit which the bankrupt derived from the property might not be capable of severance; it might be of such a kind that no definite portion of the principal or income could, in respect thereof, be diverted from its application for the benefit of the other members of the family, *e.g.*, the joint occupation of a house, which was necessary for the habitation of the wife and children, the expense of which was not increased by the circumstance, that it was also the abode of the bankrupt.[3]

A trust for the benefit of a person until his bankruptcy or insolvency, then in the discretion of the trustees for the subsistence of himself and family, was held in *Rippon* v. *Norton*,[4] on the insolvency taking place, to entitle his three children to three-fourths of the fund, and the assignees to the remaining fourth. This case goes further than *Page* v. *Way*[5] and *Kearsley* v. *Woodcock*.[6] In *Wallace* v. *Anderson*,[7] the trustees were, after the bankruptcy of the husband and the death of the wife, to pay the income in such manner, for the maintenance and support, or otherwise for the benefit of the husband and the issue, as they

[1] Godden *v.* Crowhurst, 10 Sim., 642.
[2] 3 Hare, 185.
[3] See also Wallace *v.* Anderson, 16 Beav., 533.
[4] 2 Beav., 63.
[5] 3 Beav., 20.
[6] 3 Hare, 185
[7] 16 Beav., 633.

might think proper. It was held, that the discretionary power of the trustees, as to the application of the income, was not taken away by the bankruptcy, so as to entitle the objects to take equally. An inquiry was directed as to what had been properly applied for the maintenance of the issue, and the assignees were declared to be entitled to the surplus. Romilly, M. R., said:—"I am not satisfied that the point which has arisen in the present case was argued in *Rippon* v. *Norton*.[1] To say that the discretion of the trustees as to the application of the income was gone by the bankruptcy, is to say that it never arose, and the object of the trust would thereby be defeated. I am not sure that the Court would not, in a case like the present, follow the rule laid down in *Kearsley* v. *Woodcock*."[2]

Trust to cease on bankruptcy or insolvency.

Although, as appears from the above authorities, a trust restraining alienation of the interests of the *cestui que trust* generally, or attempting to continue the interest of the *cestui que trust* after his bankruptcy, is void, yet there is no objection to a trust to determine, in case the *cestui que trust* shall become bankrupt or insolvent,[3] or shall attempt to assign or incumber his interest.[4] The interest of the *cestui que trust* in such a case determines as soon as the act forbidden is done, even though the interest is still in expectancy. Thus, where property was settled in the year 1823 on a wife for life, with remainder to the husband, "until he should make any composition with his creditors for the payment of his debts, although a commission of bankruptcy should not issue against him;" and in 1842, the husband's principal creditors agreed to take a composition on their debts secured by bills, and the wife did not die until 1852,—it was held, that the composition, though it was not made with the whole of the husband's creditors, and was made during the wife's life, and did not affect the trust-property, nevertheless operated as a forfeiture of the husband's interest.[5] So the interest will determine upon the execution of a composition deed by the *cestui que*

[1] 2 Beav., 63. [2] 3 Hare, 185.

[3] Lockyer *v.* Savage, 2 Str., 947; *Ex parte* Oxley, 1 B. and B., 257; *Ex parte* Hinton, 14 Ves., 598; Cooper *v.* Wyatt, 5 Mad., 482; Yarnold *v.* Moorehouse, 1 R. and M., 364; Lewes *v.* Lewes, 6 Sim., 304; *In re* Aylwin's Trusts, L. R., 16 Eq., 585.

[4] Stanton *v.* Hall, 2 R. and M., 175; Stephens *v.* James, 4 Sim., 499; Oldham *v.* Oldham, L. R., 3 Eq., 404.

[5] Sharp *v.* Cosserat, 20 Beav., 470.

LECTURE I.

trust, even though he does not become bankrupt or insolvent, or execute any assignment of the property for the benefit of his creditors.[1] If a sum of money is left for the purpose of purchasing an annuity for a particular person, with a condition that it shall determine if the annuitant shall at any time sell, assign, incumber, or in anywise dispose of or anticipate the same, the annuitant will not be entitled to the value of the annuity.[2] The rules to be followed in determining questions of this class were thus laid down by Turner, V. C., in *Rochford* v. *Hackman*:[3] First, that property cannot be given for life any more than absolutely, without the power of alienation being incident to the gift; and that any mere attempt to restrict the power of alienation, whether applied to an absolute interest or to a life-estate, is void, as being inconsistent with the interest given; and secondly, that although a life-interest may be expressed to be given, it may be well determined by an apt limitation over. And he also expressed an opinion that the life-interest might be well determined by a proviso for cesser, although it be not accompanied by any limitation over, for no greater effect could, he thought, be given to a limitation over than to an express declaration that the life-interest should cease. This latter point was expressly decided by Wood, V. C., in *Joel* v. *Mills*.[4]

Trust to cease on happening of particular event.

A clause providing for the determination of the interest of the *cestui que trust* upon the happening of a particular event within a specified time, whether the time is certain or uncertain, is good, *e.g.*, a clause providing against disposition during the life of a third person,[5] or before attaining a certain age.[6]

When property is settled on *A* for life, and after her death on *B* for life, until he shall become insolvent, and then over, the gift over takes effect on *B's* insolvency in *A's* lifetime.[7]

Clauses of forfeiture construed strictly.

Clauses of forfeiture will be construed strictly, and therefore the very act provided against must have been done. Thus a proviso giving property over, if the *cestui que trust* should alienate, or attempt to alienate, it does not come

[1] Billson *v.* Crofts, L. R., 15 Eq., 314.
[2] Hatton *v.* May, L. R., 3 C. D., 148.
[3] 9 Hare, 480. [4] 3 K. and J., 458.
[5] Kearsley *v.* Woodcock, 3 Hare, 185.
[6] Churchill *v.* Marks, 1 Coll., 441.
[7] *Re* Muggeridge's Trust, Johns., 625.

into effect on his bankruptcy, which is an alienation by operation of law, and not a voluntary act.[1] It would, however, come into effect if he presented a petition in insolvency, see *infra*, note 10; and the penalty of forfeiture on bankruptcy is not incurred by a composition with creditors.[2] The words of the clause, however, may be so wide as to show that the author intended that it should come into effect upon the *cestui que trust* doing any act which would affect the life-estate.[3]

So the giving a warrant of attorney will not work a forfeiture, unless done as a contrivance to evade the prohibition against alienation;[4] nor, even in England, will the marriage of a *feme sole* cause a forfeiture of an annuity which is to determine upon the annuitant's doing any act by which the property "should be vested or become liable to be vested in any other person."[5] So a charge on arrears of an annuity is good,[6] or a charge on the income as it accrues.[7]

A general assignment of property will not include property liable to forfeiture.[8]

Where there is a clause of forfeiture on bankruptcy, and the *cestui que trust* becomes bankrupt, and the bankruptcy is annulled before any beneficial interest in the property has come to the assignee, the clause will not take effect.[9]

The presentation of a petition in insolvency by the insolvent himself is a voluntary act, and as the property of the insolvent vests in the Official Assignee, the presentation of a petition would be an alienation of his property, and would work a forfeiture.[10]

The owner of property, whether moveable or immove-

[1] Lear *v.* Leggett, 2 Sim., 479; Whitfield *v.* Prickett, 2 Keen, 608.

[2] Montefiore *v.* Enthoven, L. R., 5 Eq., 35.

[3] *Ex parte* Eyston L. R, 7 C. D., 145.

[4] Avison *v.* Holmes, 1 J. and H., 530; Barnett *v.* Blake, 2 Dr. and Sm., 117; Montefiore *v.* Behcens. 35 Beav., 95.

[5] Bonfield *v.* Harsell, 32 Beav., 217; see, however, Craven *v.* Bradley, L. R., 4 Ch. App., 296.

[6] *Re* Stretz's Trusts, 4 D. M. G., 404.

[7] Cox *v.* Bockett, 35 Beav., 48.

[8] Fausset *v.* Carpenter, 2 Dow. and Cl., 232.

[9] Ancona *v.* Waddell, L. R., 10 C. D., 157.

[10] See Shee *v.* Hale, 13 Ves., 404; Brandon *v.* Aston, 2 Y. and C. C. C., 24; Churchill *v.* Marks, 1 Coll., 441; Martin *v.* Margham, 14 Sim., 230; Townsend *v.* Early, 34 Beav., 23.

LECTURE I.

able, cannot create a trust of it for his own benefit to go over in case of his bankruptcy or insolvency.[1]

Trust for immoral purposes.

Any trust, as well as any contract for immoral purposes, is of course void.[2]

Failure of trust.

If the purpose for which the trust is created fails, because it is unlawful or fraudulent, a Court of Equity will not act. It cannot enforce the trust in favour of the *cestui que trust*, for that would be to declare the trust to be good; and it will not restore the property to the author of the trust, because a man cannot be allowed as plaintiff to plead his own wrong. A right of action cannot arise out of fraud. In such a case, therefore, if the property has got into the hands of the trustee, the author of the trust is without remedy, for where there is an equal wrong, the title of the holder shall prevail.[3] But though the author of an unlawful or fraudulent trust cannot recover the property from the trustees, persons claiming through him may sue for the purpose. "There is a great difference," said Lord Eldon, "between the case of an heir coming to be relieved against the act of his ancestor in fraud of the law, and of a man coming upon his own act under such circumstances."[4] A defendant cannot set up the fraud of his ancestor.[5]

Illegal purpose failing.

There is an exception to the general rule that where a trust has been created for an unlawful or fraudulent purpose, the Court will not interfere; for it will do so where the illegal purpose fails to take effect, and nothing is done under it. The mere intention to effect an illegal object will not deprive the author of the trust of his right to recover the property.[6]

[1] *In re* Murphy, 1 Sch. and Lef., 44; *In re* Meaghan, *ib.*, 179; Higinbotham *v.* Holme, 19 Ves., 88. As to settlements on marriage, see Lewin, 7th edn., 94.

[2] See Contract Act, I of 1872, s 23, illus (*k*); Thornton *v.* Howe, 31 Beav., 14. See as to dancing-girls, Chinna Ummayi *v.* Tegarai Chetti, I. L. R., 1 Mad., 168; Mathura Naikin *v.* Esu Naikin, I. L. R., 4 Bomb., 545.

[3] Cottington *v.* Fletcher, 2 Atk., 155; Chaplin *v.* Chaplin, 3 P. Wms, 229; Muckleston *v.* Brown, 6 Ves., 68; Ottley *v.* Browne, 1 B. and B., 360; Groves *v.* Groves, 3 Y. and J., 163; Hamilton *v.* Ball, 2 Ir. Eq, 191; Davies *v.* Otty, 35 Beav, 208; Haigh *v.* Kaye, L. R., 7 Ch., 469.

[4] Muckleston *v.* Brown, 6 Ves., 68; Joy *v.* Campbell, 1 Sch. and Lef., 328; Matthew *v.* Hanbury, 2 Vern., 187; Brackenbury *v.* Brackenbury, 2 Jac. and W., 391; Groves *v.* Groves, 3 Y. and J, 163; Miles *v.* Durnford, 2 D. M. G., 641; Childers *v.* Childers, 3 K and J., 310; 1 DeG. and J., 482.

[5] *Doe d.* Roberts *v.* Roberts, 2 B. and Ald., 367; Bessey *v.* Windham, 6 Q. B, 166; Phillpotts *v* Phillpotts, 10 C B., 85.

[6] Davies *v.* Otty, 35 Beav., 208; Symes *v.* Hughes, L. R., 9 Eq., 475; Manning *v.* Gill, L. R., 13 Eq., 485; Haigh *v.* Kaye, L. R., 7 Ch., 469.

If the defendant wishes to rely on the illegality of the transaction as a defence, he must plead it in distinct terms.[1]

Must be a *cestui que trust*.

In order to a complete trust, there must be a *cestui que trust*, a person to be benefited by the trust, otherwise the trust fails, and the property appropriated for the purpose results to the author of the trust or his representatives. In England, it has been repeatedly held, that a trust, merely for the purpose of keeping up tombs or buildings, which are of no public benefit, but only an individual advantage, is not a charitable use, but a perpetuity, and is void.[2]

Trust partly lawful and partly unlawful.

The object of a trust must, as we have seen, *ante*, p. 33, be lawful. Where the object is clearly unlawful, no difficulty arises, for the Court will not enforce an illegal trust. But the object may be in part lawful and in part unlawful, and the question then arises as to whether the whole trust fails, or whether the lawful part remains good. In England the rule is, that if property be given to trustees, to apply part thereof for an unlawful purpose, and to hold or apply the residue for a lawful purpose, then, unless the amount intended to be applied for the unlawful purpose can be ascertained, the whole gift will fail; but the fact that the amount to be applied for the unlawful purpose has not been expressly stated in the gift, will not make the whole gift void; and the Court will, if it be practicable, ascertain the amount which would have satisfied the unlawful purpose, and hold the gift good as to the residue.[3] The Contract Act[4] provides, that where persons reciprocally promise, firstly, to do certain things which are legal, and secondly, under certain specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement; and that, in the case of an alternative promise, one branch of which is legal, and the other illegal, the legal branch alone can be enforced.

Trust of immoveable property in foreign country.

If a trust is created of immoveable property in a foreign country, the better opinion seems to be that the

[1] Haigh *v.* Kaye, L. R., 7 Ch., 469.

[2] Lloyd *v.* Lloyd, 2 Sim., N. S., 255; Thomson *v.* Shakespeare, Johns, 612; 1 De. G. F. and J., 399; Fowler *v.* Fowler, 33 Beav., 616; Fisk *v.* The Attorney-General, L. R., 4 Eq., 521; Hunter *v.* Bullock, L. R., 11 Eq., 45; Dawson *v.* Small, L. R., 18 Eq., 114; Gott *v.* Nairne, L. R., 3 C. D., 278; *Re* Williams, L. R., 5 C. D., 735.

[3] See Lewin on Trusts, 7th Edn., 97.

[4] IX of 1872, ss. 57, 58

LECTURE I.

trusts must conform to the laws of the land where the property is. In *Nelson* v. *Bridport*,[1] an estate in Sicily had been granted to Lord Nelson with power to appoint a successor, and it was held that the incidents to real estate, the right of alienating it, and the course of succession to it, depend entirely upon the law of the country where the estate is situated.

[1] 8 Beav., 547.

BENGAL SECRETARIAT LIBRARY.

LECTURE II.

DECLARATION OF TRUST.

Declaration of trust — Intention to create trust must be shown — Valuable consideration — Consideration not necessary — Transmutation of possession — Voluntary settlements — If incomplete, not enforced against settlor — If nothing more to be done by settlor, trust is complete — Assignment by *cestui que trust* — Notice — What amounts to a valid declaration of trust — Ineffectual assignment — *Chose-in-action* — Subsequent disclaimer by trustee — Settlor cannot revoke voluntarily — Setting aside voluntary settlement — Defrauding creditors — To what property Statute applicable — Question of fraud is one of fact — Assignment by way of mortgage — Valuable consideration not support when *mala fides* — Sale to defeat Crown — Assignment in favour of one creditor — Voluntary settlements within Statute — Indebtedness of settlor — Secured debts — Consideration paid to third person — Voluntary settlement only void as against existing creditors — Unless fraud — How far settlement void — Insolvent Act, s. 9 — Section 24 — Defrauding purchaser — Statute does not extend to personal estate — When settlor may defeat settlement — Subsequent purchase must be for value — How far voluntary settlement defeated — Personalty settled — Subsequent will — Conveyances with power of revocation — Effect of Statute — Valuable consideration — Marriage — Extrinsic evidence admissible to show consideration — Settlement not set aside as against grantors — Voluntary settlement in expectation for death — Rectifying settlement — Enforcement — On whom binding — Creditors' deeds how far revocable — Johns *v.* James — Execution of deed by creditors — Deed not communicated to creditors — Trust by will for payment of debts.

I NOW propose to treat of the manner in which a trust may be declared. Declaration of trust.

As regards moveable property beyond the limits of the ordinary original civil jurisdiction of the High Courts, whether belonging to European British subjects, Hindus or Mahomedans, trusts may be declared by parol, or by an instrument in writing, which may be either testamentary or non-testamentary. The Hindu law, in no transaction, absolutely requires a writing;[1] nor, so far as I am aware, does

[1] Crinivasammal *v.* Vijayammal, 2 Mad. H. C. R., 37; Krishna *v.* Rayappa, 4 Mad. H. C. R., 98; M. S. Rookho *v.* Madho Dass, 1 N. W. P. H. C. R., 63; Jivandas Keshavji *v.* Framji Nanabhai, 7 Bom. H. C., O. J., 51; Hurpurshad *v.* Sheo Dyal, L. R., 3 I. A., 259. See, however, Sirdar Sainey *v.* Piran Singh, I. L. R., 3 All., 466.

LECTURE II.

the Mahomedan law. With regard to European British subjects resident without the limits of the jurisdiction of the High Courts, it is doubtful whether they would be governed by the Statute of Frauds or not.[1] If not, they would be governed by the English Common Law as it stood before the Statute, and at Common Law a trust, whether of real or personal property, was averable,—that is, might be declared by parol.[2] So much of the Statute of Frauds as relates to the creation of trusts is still in force within the Presidency-Towns, and trusts of lands created by European British subjects must conform to the provisions of the Statute. The seventh section provides that all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments shall be manifested and proved by some writing to be signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect. Trusts of moveable property are not within the Statute, and may therefore be declared by parol.[3]

Intention to create trust must be shown.

It is only necessary that the person creating the trust shall clearly show his intention to create the trust,[4] and shall point out the subject-matter of the trust and the persons who are to benefit by it. Technical words are not necessary, but if they are used, their technical meaning must be given to them.[5] Where there is valuable consideration, and a trust is intended to be created, formalities are of minor importance, since, if the transaction cannot take effect by way of trust executed, it may be enforced by a Court of Equity as a contract.[6] Where immoveable property was given into the possession of the defendant under an order of a revenue officer, which directed the defendant to sell the crops, and after payment of the Government dues, to account for the profits to the plaintiff on his claiming it, it was held that the defendant was not a depositary, but a trustee.[7]

Valuable consideration.

[1] See Gardiner *v.* Fell, 1 Moo. I. A., 299; Freeman *v.* Fairlie, *ib.*, 305; Mayor of Lyons *v.* East India Co., *ib.*, 175; Stokes's Older Statutes, i.

[2] See Lewin, 7th Ed., p. 47.

[3] Fordyce *v.* Willis, 3 Bro. C. C., 587; M'Fadden *v.* Jenkyns, 1 Hare, 461; Peckham *v.* Taylor, 31 Beav., 250.

As to the formalities requisite in order to comply with the Statute of Frauds, *see* Lewin, 7th Ed., p. 49; and as to the Statute of Wills, *see* p. 53.

[4] Lewin, 7th Ed., p. 71. [5] *Ibid*, 99. [6] *Ibid*, 62.

[7] Vital Vishva Nath Prabhu *v.* Ram Chandra Sadashiv Kirkire, 7 Bom. H. C., 149.

LECTURE II.

Consideration not necessary.

Transmutation of possession.

It is not necessary there should be any consideration to support a trust.[1] If a trust has been perfectly created, it is not necessary that there should have been a transmutation of possession, and it cannot afterwards be defeated by any act of the settlor.[2] As a general rule, it may be laid down that, in order to make a voluntary declaration of trust binding upon the author of the trust, he must have completely parted with all his interest in the property to the trustee, or have declared himself to be a trustee of the property for the benefit of the *cestuis que trustent*.[3] It is not necessary, in order that the trust may be binding, that it should be communicated to, or accepted by, the volunteer.[4]

Voluntary settlements

The leading case with reference to settlements and trusts in favour of a volunteer,—that is to say, a person who has not given any consideration, is *Ellison* v. *Ellison*.[5] "I take the distinction to be," said Lord Eldon, "that, if you want the assistance of the Court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*; as upon a covenant to transfer stock, &c., if it rests in covenant and is purely voluntary, this Court will not execute that voluntary covenant. But if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this Court. . . . If the actual transfer is made, that constitutes the relation between trustee and *cestui que trust*, though voluntary, and without good or meritorious consideration."

If incomplete, not enforced against settlor.

But although a voluntary settlement or grant may be valid as against creditors and purchasers, it may be incomplete; and then will not be enforced against the settlor."[6]

[1] Lewin, 7th Ed., 62; see also Suttaprosunno Ghosal *v.* Rakhalmoney Dossee, Boul., 706.

[2] Jamsetji Jijibhai *v.* Sona Bhai, 2 Bom. H. C. R., 143; and see Lewin, 7th Ed., 62.

[3] Milroy *v.* Lord, 4 D. F. & J., 274; Warriner *v.* Rogers, L. R., 16 Eq., 340; Richards *v.* Delbridge, L. R., 18 Eq., 11; Heartley *v.* Nicholson, L. R., 19 Eq., 233. As to what amounts to a complete transfer, see Parnell *v.* Hingston, 3 Sm. & G., 337; Wheatley *v.* Purr, 1 Keen., 551; Stapleton *v.* Stapleton, 14 Sim., 186; Moore *v.* Darton, 4 DeG. & Sm., 517; Gee *v.* Liddell, 35 Beav., 621.

[4] *Re Way*, 2 D. J. & S., 365; Lambe *v.* Orton, 1 Dr. & Sm., 125; Tate *v.* Leithead, Kay, 658.

[5] 6 Ves., 656; 1 W. & T. L. C., 245, 4th Ed.

[6] Antrobus *v.* Smith, 12 Ves., 46; Ellison *v.* Ellison, 6 Ves., 662; Jeffreys *v.* Jeffreys, Cr. & Ph., 138; *Ex parte* Pye, 18 Ves., 149.

LECTURE II.

A volunteer has no equity to enforce a mere voluntary promise to assign against the assets of the person who made the promise.[1] A voluntary covenant to transfer stock is a mere imperfect gift which equity will not assist.[2] So is a voluntary covenant to transfer shares.[3] A voluntary settlement is incomplete unless the interest of the donor has been completely parted with, and therefore a voluntary agreement to declare a trust will not be enforced.[4] Even if the settlor has executed a deed purporting to pass his interest, and he intends to carry out the transaction, yet if, for any reason, he has not in fact parted with his interest, the trust cannot be executed.[5] But when a covenant or other instrument creates such a complete obligation on the part of the covenantor, that damages would be recoverable in case of breach, effect will be given to it, as when a person covenants to pay a sum of money or an annuity.[6] So a settlement or gift by the bond of the settlor may be enforced against the obligor's estate;[7] and a person claiming under such a bond is within the Statute 13 Eliz., c. 5, and is entitled to the protection of the Statute like any other creditor.

In *Hervey* v. *Audland*,[8] it was held that a covenantee under a voluntary covenant for further assurance could not prove under an administration suit against the covenantor's estate. But, in *Cox* v. *Barnard*,[9] this was allowed, upon the ground that though the Court might not specifically execute the covenant as damages were wanted, it could give damages.[10] The delivery of property or securities passing by delivery is valid.[11]

[1] Marlèr *v.* Tommas, L. R., 17 Eq., 8, 13.

[2] Ellison *v.* Ellison, 6 Ves., 656; Ward *v.* Audland, 8 Sim., 571.

[3] Dillon *v.* Coppin, 4 M. and C., 647; Dillwyn *v.* Llewelyn, 4 D. F. J., 517.

[4] Evelyn *v.* Templar, 2 Bro. C. C., 148; Coleman *v.* Sarrel, 1 Ves., J., 50; Jeffreys *v.* Jeffreys, Cr. and Ph., 138.

[5] Garrard *v.* Lord Lauderdale, 2 R. & M., 452; Meek *v.* Kettlewell, 1 Hare., 469; Richards *v.* Delbridge, L. R., 18 Eq., 11; Heartley *v.* Nicholson, L. R., 19 Eq., 233; Batstone *v.* Salter, L. R., 10 Ch., 431; Bulbeck *v.* Silvester, 45 L. J., Ch., 280.

[6] Fletcher *v.* Fletcher, 4 Hare, 67; Watson *v.* Parker, 6 Beav., 283; Clough *v.* Lambert, 10 Sim., 174; Hales *v.* Cox, 32 Beav., 118; Bonfield *v.* Hassell, *ib.*, 217.

[7] Dening *v.* Ware, 22 Beav., 184; Hall *v.* Palmer, 3 Hare, 532.

[8] 14 Sim., 531. [9] 8 Hare, 310.

[10] See Patch *v.* Shore, 2 Dr & Sm., 589.

[11] Irons *v.* Smallpiece, 2 B. & Al., 551; M'Culloch *v.* Bland, 2 Giff., 428.

If, however, the grantor adopts some other mode of transfer than that which is necessary to effect a complete assignment of the property, the transferee will not be entitled unless the instrument can be construed as a declaration of trust. For instance, an attempt to transfer shares or property of that description by some other mode than that which is effectual by the rules of the company or society in which the shares are held is not an effectual transfer: as, for instance, where the owner of shares endorsed on the certificates the words, "I hereby assign, &c.," to others, but no transfer was executed, he was held to have a *locus pœnitentiæ* so long as the gift was incomplete. So a power-of-attorney given to the trustee to transfer will not be sufficient unless he acts upon it.[1] Again, where the transfer is in other respects imperfect and does not operate on the whole property,[2] and if the assignment or other mode of gift or settlement is incomplete and the gift is intended to take effect by it, the Court will not construe it as a declaration of trust, and upon this ground give effect to it, for then every imperfect instrument would be made effectual by being converted into a perfect trust.[3] Where a cheque was given to one in trust for another, with a verbal direction that the amount was to be in trust instead of a legacy given by will to the proposed *cestui qui trust*, the declaration was held to be inoperative;[4] and where a cheque was given by the owner to his young child with a declaration before witnesses, but was afterwards retained by the owner till his death,[5] no trust was created. But an instrument executed as a present and complete assignment (not being a mere covenant to assign at a future time) is equivalent to a declaration of trust; therefore, such an instrument will pass promissory notes of the grantor, though neither specifically mentioned in the deed, nor indorsed by him.[6] This case, and the observations in *Grant* v. *Grant*,[7] would seem, to a

[1] Milroy *v.* Lord, 4 D. F. J., 264; Antrobus *v.* Smith, 12 Ves., 39; Dillon *v.* Coppin, 4 M. and Cr., 647; Searle *v.* Law, 15 Sim., 95; Cunningham *v.* Plunket, 2 Y. and C.C.C., 245; Weale *v.* Ollive, 17 Beav., 252; Moore *v.* Moore, L. R., 18 Eq., 474.

[2] Woodford *v.* Charnley, 28 Beav., 96.

[3] Milroy *v.* Lord, 8 Jur. N. S., 806; Richards *v.* Delbridge, L. R., 18 Eq., 11; Heartley *v*, Nicholson, L. R., 19 Eq., 233; Bottle *v.* Knocker, 46 L. J., Ch., 159; Baddley *v.* Baddley, L. R., 9 Ch. Div., 113; Fox *v.* Hawkes, L. R., 13 Ch. Div., 822.

[4] Hughes *v.* Stubbs, 1 Hare, 476. [5] Jones *v.* Lock, L. R., 1 Ch., 25.

[6] Richardson *v.* Richardson, L. R., 3 Eq., 686. [7] 34 Beav., 623.

LECTURE II.

If nothing more to be done by settlor, trust is complete.

certain extent, to modify the doctrine in *Milroy* v. *Lord*,[1] which, however, was a decision of the Lords Justices. And if nothing more remains to be done or can be done by the grantor or donor,—if, as far as he is concerned, the conveyance or assignment is complete, and he has done all that is necessary to be done, having regard to the nature of the property,—the assignment or other assurance will be valid in equity.[2] Thus, an assignment of a policy of assurance by deed is valid, although the grantor may retain the deed and give no notice of the assignment to the office.[3] And where there was a voluntary assignment of a *chose-in-action*, followed by a power-of-attorney to receive it, this would seem to be sufficient to give a right in equity to have the deed enforced even after the death of the assignor.[4]

After a valid declaration of trust, the fact that the trust-fund is found at the settlor's death mixed up with his own moneys, does not affect the validity of the trust.[5]

Assignment by *cestui que trust*.

Notice.

When property is vested in a trustee, the *cestui que trust* may make a valid assignment of his beneficial interest, and the assignee will have the right to enforce it by proceeding against the trustee.[6] Notice to the trustee is not necessary to perfect the trust, even as against a subsequent volunteer who does give notice. As against the settlor an equitable interest is perfectly transferred without notice.[7] But a voluntary assignment of a mere expectancy in an equitable interest, not communicated to the trustees, does not amount to the creation of a trust.[8] If notice is not given, the trustee will be justified in paying over the fund to the grantor.[9] And if the settlor conveys his equitable interest

[1] 8 Jur., N. S., 806.

[2] Sloane *v* Cadogan, Sugd V. and P., 11th Ed., App; Edwards *v*. Jones, 1 M. and C., 238; Milroy *v*. Lord, 8 Jur, N. S., 806.

[3] Fortescue *v*. Barnett, 3 M. and K., 36; Pearson *v*. Amicable Assurance Co., 27 Beav., 229; Podder *v*. Mosely, 31 Beav., 159; Kekewich *v*. Manning, 1 D. M. G., 187.

[4] Kiddill *v*. Farnell, 3 Sm. and G., 428; Weale *v*. Ollive, 17 Beav., 252; Woodford *v*. Charnley, 28 Beav., 96.

[5] Thorpe *v*. Owen, 5 Beav., 224.

[6] Sloane *v*. Cadogan, Sugd. V. and P., 11th Ed., App; Kekewich *v*. Manning, 1 D. M. G., 176; Donaldson *v*. Donaldson, Kay, 711; Voyle *v*. Hughes, 2 S. and G., 18; Pearson *v*. Amicable Assurance Co., 27 Beav., 229; *Re* Way, 2 D. J. and S., 365; *In re* King L. R., 14 C. D., 179.

[7] Burn *v*. Carvalho, 4 M. and Cr., 690; Donaldson *v*. Donaldson, Kay, 711; Sloper *v*. Cottrell, 6 E. and B., 504; Gilbert *v*. Overton, 2 H. and M., 110.

[8] Meek *v*. Kettlewell, 1 Hare, 464; affd. 1 Phillips, 342; Penfold *v*. Mould, L. R., 4 Eq., 564.

[9] Donaldson *v*. Donaldson, Kay, 711.

to trustees, and directs them to hold it upon trust for another, that will be as effectual as if he had declared himself a trustee.[1] So it will be sufficient if he directs his trustees to stand possessed of the property upon the new trusts,[2] or even if he assigns it to the new *cestui que trust* without the intervention of a trustee.[3]

What amounts to a valid declaration of trust.

A voluntary settlement may be effected by a declaration of trust, by which the owner of property declares either himself, or another person in whom the property is vested, a trustee for the voluntary grantee.[4] A declaration of trust is not confined to any express form of words, but may be indicated by the character of the instrument.[5] If the settlor shows no intention of keeping a control over the settled property otherwise than as a trustee for the objects of his bounty, the trust will be effectual.[6] The tendency of modern decisions is to construe a voluntary settlement or gift inoperative, as a complete transfer of the property as a declaration of trust, if this can be done consistently with the previous authorities.[7]

A direction by the beneficial owner of property to his trustees to hold it for others than himself acted upon by the trustees is valid as a declaration of trust. Thus, where the *cestui qui trust* of money in the hands of a trustee, by deed without consideration, directed part of the dividends to be paid by him for the maintenance of an infant, or stranger, and covenanted to indemnify him, and agreed to allow the same out of the dividends, and the trustee accepted the new trust and acted upon the deed, it was held that there was a valid executed trust created which could not be revoked.[8]

A receipt in the form "received of *A*, for the use of *B*, £100, to be paid to *B* at *A*.'s death" is a sufficient declaration

[1] Gilbert *v.* Overton, 2 H. and M., 110

[2] Rycroft *v.* Christy, 3 Beav, 238; M'Fadden *v.* Jenkins, 1 Hare, 458; Lambe *v.* Orton, 1 Dr. and S., 125.

[3] Cotteen *v.* Missing, 1 Mad., 176; Collinson *v.* Pattrick, 2 Keen, 123; Godsal *v.* Webb, *ib.*, 99.

[4] Collinson *v.* Pattrick, 2 Keen. 123.

[5] Kekewich *v.* Manning. 1 D. M. G., 176.

[6] Wheatley *v.* Purr. 1 Keen, 551; Vandenberg *v.* Palmer, 4 K. and J., 204.

[7] See Kekewich *v.* Manning, 1 D. M. G., 176; Richardson *v.* Richardson, L. R., 3 Eq., 686.

[8] Rycroft *v.* Christy, 3 Beav., 238; and see Bentley *v.* Mackay, 15 Beav., 12; M'Fadden *v.* Jenkyns 1 Ph., 153; Meek *v.* Kettlewell, *ib.*, 342; Gilbert *v.* Overton, 2 H. and M., 110.

LECTURE II.

of trust.[1] In *Grant* v. *Grant*,[2] Lord Romilly said, that if *A*, having a sum of consols, were to say to *B*, "I give you that sum," or to *C* "I have given that sum to *B*," that would be sufficient to make *A* trustee for *B*. See also *Milroy* v. *Lord*.[3] In *Morgan* v. *Malleson*,[4] the donor made and signed a memorandum, "I hereby give and make over to *A* a bond," specifying it, but retaining it in his own possession; and it was held, that there had been a sufficient declaration of trust in favour of *A*.[5]

A banker, who debits himself in his books with money in favour of another, thereby declares himself a trustee of it.[6] So, where a person deposits securities for money in the hands of a trustee, stating that he intends them as a provision for the voluntary grantee.[7]

Ineffectual assignment.

An assignment, or attempted assignment, by the grantor, of property, in a way which is ineffectual to pass the interest, will be good if the assignment is upon trust for the grantee in such terms that the Court can construe it as a declaration of trust by the grantor.[8]

Chose-in-action.

An assignment of a *chose-in-action*, with a power-of-attorney to enforce payment, coupled with a declaration that the fund shall be held upon certain trusts for the benefit of the assignor, and ultimately of the assignee, is valid.[9] And a declaration of trust will be valid though the settlor may retain a control over the fund[10] or keep the instrument declaring the trust in his possession.[11] A mere expression of intention to be carried into effect by some future act does not amount to a declaration of trust.[12]

Subsequent disclaimer by trustee.

If a settlor conveys his property to a trustee in such a manner as to completely divest himself of it, and the

[1] Moore *v.* Darton, 4 DeG. and Sm., 517; see also Paterson *v.* Murphy, 11 Hare, 88.
[2] 34 Beav., 623. [3] 8 Jur., N. S., 809. [4] L. R., 10 Eq., 475.
[5] *In re* Bellasis' Trusts, L. R., 12 Eq., 218; Warriner *v.* Rogers, L. R., 16 Eq., 349.
[6] Stapleton *v.* Stapleton, 14 Sim., 186.
[7] Watson, 284, citing Arthur *v.* Clarkson, 14 W. R. (Eng.), 754.
[8] Airey *v.* Hall, 3 Sm and G., 315; Parnell *v.* Hingston, *ib.*, 337.
[9] Parnell *v.* Hingston, 3 Sm. and G., 337; see also Lewin, 7th Edn., p. 64, and *In re* King, L. R., 14 C. D., 179.
[10] Wheatley *v.* Purr, 1 Keen, 551; Vandenberg *v.* Palmer, 4 K. and J., 204.
[11] *Re* Way's Trust, 2 DeG. J. S., 365; Fletcher *v.* Fletcher, 4 Hare, 67; Hope *v.* Harman, 11 Jur., 1097.
[12] Bayley *v.* Boulcott, 4 Russ., 345.

trustee subsequently disclaims, the accident of the disclaimer has been held not to vitiate the deed, but the Court will appoint a new trustee.[1]

If the person in whose favour a voluntary gift is made incurs expense in respect of the property, the subject of the gift, with the sanction of the donor, he may call for a conveyance of it.[2]

Settlor cannot revoke voluntarily.

A complete voluntary settlement cannot be revoked by a subsequent voluntary settlement, even if the property becomes re-vested in the settlor, for he will then take it not absolutely, but as a trustee.[3]

According to Shiah law, a man who devotes property to charitable or other uses, and transfers the proprietary right therein to a trustee, cannot, at his pleasure, take it back from the trustee, whom he has constituted the owner, and give it to another person, unless, on the creation of the trust, he has reserved to himself the right to do so in express terms.[4]

But if a person, without the privity of any one, and without receiving consideration, makes a disposition as between himself and trustees for purposes connected with himself, he is merely directing the mode in which his own property shall be applied for his own benefit, and the deed will operate merely as a power to the trustees and will be revocable by the party making it, for the settlor being the only *cestui que trust*, may direct the disposition of his own trust-fund.[5]

Setting aside voluntary settlement.

If a voluntary settlement has been obtained by fraud or undue influence, or has been executed under a mistake, it may be set aside.[6]

Defrauding creditors.

A voluntary settlement made with the intention of defrauding creditors will be void as against them under the Statute 13 Eliz., cap. 5.[7] This Statute is in force in the

[1] Lewin, 7th Ed., 64, citing Jones *v.* Jones, W. N., 1874, p. 190.

[2] Dillwyn *v.* Llewelyn, 4 DeG. F. and J., 517.

[3] Newton *v.* Askew, 11 Beav., 145; Ellison *v.* Ellison, 6 Ves., 656; Smith *v.* Lyne, 2 Y. & C. C. C., 345; Paterson *v.* Murphy, 11 Hare, 88.

[4] Hidait-oon-nissa *v.* Syud Afzul Hossein, 2 N. W. P., 420.

[5] Kanye Dass Byragee *v.* Ramgopal Ghose, 16 S. D. A., 23.

[6] Huguenin *v.* Basley, 14 Ves., 273; Forshaw *v.* Welsby, 30 Beav., 243; Nanney *v.* Williams, 22 Beav., 152; Davies *v.* Otty, 35 Beav., 208; Bindly *v.* Mulloney, L. R., 7 Eq., 343; Manning *v.* Gill, L. R., 13 Eq., 485; Rujabai *v.* Ismail Ahmed, 7 Bom., 35.

[7] Gooche's case, 5 Rep., 60, *a*; and Nunn *v.* Wilson, 8 T. R., 521; *Doe v.* Ball, 11 M. & W., 531.

LECTURE II.

Presidency-Towns.[1] In *Sham Kissore Shaw* v *Cowie*[2] it was held to be applicable to persons other than European British subjects; and in *Gnanabhai* v. *Srinivasa Pillai*,[3] the Court say that the principles applied in the English cases may fully be made applicable to voluntary transactions between natives.[4] But in *Azimunnissa Begum* v. *Dale*,[5] Bittleston, J., seemed to think that the Statute did not apply.

The absence of consideration is taken to be comprised in the term 'fraudulent,' though the Act does not specially refer to voluntary conveyances in so many words.[6] But the extent of the value given is not taken into consideration; the question is, whether the transaction was one of bargain or of gift merely, and the fact that some value, *e.g.*, a covenant to indemnify against expenses, was given, may be proved *aliunde*.[7] Volunteers, who are creditors, for instance, under bonds or obligations given without valuable consideration, are as much entitled to the benefit of the Statute as any other creditors.[8]

To what property Statute applicable.

An assignment of property which cannot be taken in execution is not, within the words of the Statute, an assignment of property with the intent to delay creditors, inasmuch as creditors could never have had execution or satisfaction out of such property.[9] An assignment of *choses-in-action* is not within the Statute during the lifetime of the assignor, except as regards such as can be taken in execution.[10]

Question of fraud is one of fact.

The question as to whether the assignment was with the intent to hinder, delay, or defraud creditors, is one of fact; circumstances of suspicion do not amount to proof of fraud,[11] even when the conveyance is absolute and the grantor remains in possession, though this is generally

[1] See Stokes's Older Statute, Introd., iv.

[2] 2 Ind. Jur., 7. [3] 4 Mad. H. C., 84.

[4] And see Soodheekeena Chowdrain v. Gopee Mohun Sein, 1 W. R., 41; Judah v. Mirza Abdool Kurreem, 22 W. R., 60.

[5] 6 Mad. H. C., 474.

[6] *Doe* v. Manning, 9 East, 59; *Doe* v. Rusham, 17 Q. B., 723; Willats v. Busby, 5 Beav., 193.

[7] Pott v. Todhunter, 2 Coll., 76; Townend v. Toker, L. R., 1 Ch., 446.

[8] Adames v. Hallett, L. R., 6 Eq., 468.

[9] Rider v. Kidder, 10 Ves., 360; Norcutt v. Dodd, Cr. and Ph., 100; Barrack v. McCulloch, 3 K. and J., 110; Stokoe v. Cowan, 29 Beav., 637.

[10] Norcutt v. Dodd, Cr. and Ph., 100.

[11] Martindale v. Booth, 3 B. and Ad., 498; Hale v. Saloon Omnibus Co., 4 Drew., 492.

considered to be an indication or badge of fraud.[1] But where the conveyance is not absolute, to take effect immediately, as in the case of mortgage, and the mortgagee is not to take possession until a default in the payment of the mortgage-money, then, as the nature of the transaction does not call for any transmutation of possession, the absence of such transmutation seems to be no evidence of fraud.[2] If it be found as a fact that there was no fraud, the conveyance will, as a rule, be good under the Statute.[3]

Assignment by way of mortgage.

When the assignment is not absolute, but by way of mortgage, as the retention of the possession by the mortgagor until default in payment is in accordance with the deed, the assignment is not fraudulent.[4]

Valuable consideration not support when *mala fides.*

A valuable consideration will not support a conveyance if there be *mala fides,* and an intent to delay or defraud creditors. Even an ante-nuptial marriage settlement may be set aside. Of course, those who undertake to impeach for *mala fides* a deed which has been executed for valuable consideration, have a task of great difficulty to discharge.[5] So, if the object of the conveyance be to place the property beyond the reach of process, or to defraud future creditors, it will be void, though it may be, or may purport to be, for value.[6] An assignment by a prisoner, on the eve of trial for felony, of all his effects upon certain trusts, is within the Statute, and void as against the Crown;[7] but otherwise, if made *bonâ fide* and for value, for instance, to secure an existing debt.[8]

Sale to defeat Crown.

Assignment in favour of one creditor.

A sale of property for good consideration is not fraudulent and void, merely because it is made with the intention to defeat the expected execution of a judment-creditor.[9] And a *bonâ fide* assignment for the benefit of creditors

[1] Twyne's case, 3 Rep., 80; Martindale *v.* Booth, 3 B. & Ad, 498.
[2] 1 Sm L. C., 15.
[3] Martindale *v.* Booth, 3 B. and Ad., 498; Freeman *v.* Pope, L. R., 5 Ch., 538.
[4] Edwards *v.* Harben, 2 T. R., 587.
[5] Harman *v* Richard, 10 Hare, 89; Strong *v.* Strong, 18 Beav., 408; Bott *v.* Smith, 21 Beav., 511; Columbine *v.* Penhall, 1 Sm. and G., 228; Acraman *v.* Corbett, 1 J. & H, 410; Bulmer *v.* Hunter, L. R., 8 Eq., 46.
[6] Barling *v.* Bishopp, 29 Beav., 417; Reese River Co. *v.* Attwell, L. R, 7 Eq, 347; Blenkinsopp *v.* Blenkinsopp, 1 D. M. G., 495. See, however, Darvill *v.* Terry, 6 H. and N., 807; Hale *v.* Saloon Omnibus Co., 4 Drew., 492.
[7] Saunders *v.* Watson, 4 Giff., 179.
[8] Chowne *v.* Baylis, 31 Beav., 351.
[9] Wood *v.* Dixie, 7 Q B., 892.

LECTURE II.

generally is not within the Act, though made with the intent to delay an individual creditor.[1] But an absolute assignment, in consideration of a past debt, of property of much greater amount than the debt, by a person in a dying state, is void as against other creditors under the Statute.[2] The Statute only mentions feigned and fraudulent gifts and conveyances. But, however, voluntary conveyances or settlements have been held to be within the Statute if made to hinder or defraud creditors. The mere fact that the settlement is voluntary will not invalidate it. The principle is this: The language of the Act being, that any conveyance of property is void against creditors if made with intent to defeat, hinder, or delay creditors,—the Court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion, that the intention of the settlor in making the settlement was to defeat, hinder, or delay his creditors.[3] Nor will the fact that the settlement comprises all the settlor's property be sufficient ground for setting it aside.[4] And extrinsic evidence is admissible to show, that valuable consideration was in fact given for a deed which appears on the face of it to be voluntary,[5] or that the settlement was *bonâ fide*, though the practice of framing deeds so as not to show the real nature of the transaction carried out by them ought to be discouraged.[6] The indebtedness of the settlor at the time of the settlement is usually relied upon as showing the intent to delay and defraud creditors; but it is only one of the circumstances which the Court has to consider.[7] The indebtedness need not be to the extent of insolvency, though this was formerly held to be necessary.[8] But this is not the law now. "With respect to voluntary settlements," said Wood, V. C.,[9] "the result of the

Voluntary settlements within Statute.

Indebtedness of settlor.

[1] Pickstock *v.* Lyster, 3 M. & S., 371; Harland *v.* Binks, 15 Q. B., 713; Evans *v.* Jones, 3 H. & C., 423.

[2] Stokoe *v.* Cowan, 7 Jur., N. S., 901. As to the right of a creditor to follow the assets of a deceased Hindu into the hands of a purchaser for value, see Jamyatram Ramchandra *v.* Parbudhas Hathi, 9 Bom., 116.

[3] Thompson *v.* Webster, 4 Drew, 632; Holloway *v.* Millard. 1 Madd., 414; Holmes *v.* Penney, 3 K. & J., 90.

[4] Alton *v.* Harrison, L. R., 4 Ch., 622; Allen *v.* Bonnett, L. R., 5 Ch., 577; *Ex parte* Games, L. R., 12 C. D., 314.

[5] Gale *v.* Williamson, 8 M. and W., 405.

[6] Thomson *v.* Webster, 4 DeG. and J., 600.

[7] Richardson *v.* Smallwood, Jac., 556.

[8] Lush *v.* Wilkinson, 5 Ves., 384.

[9] Holmes *v.* Penney, 3 K. and J., 99; Crossley *v.* Elsworthy, L. R., 12 Eq., 158; Taylor *v.* Coenen, L. R., 1 Ch. Div., 636.

authorities is, that the mere fact of a settlement being voluntary is not enough to render it void against creditors: but there must be unpaid debts which were existing at the time of making the settlement, and the settlor must have been at the time not necessarily insolvent, but so largely indebted as to induce the Court to believe that the intention of the settlement, taking the whole transaction together, was to defraud the persons who, at the time of making the settlement, were creditors of the settlor.[1]

On the other hand, although indebtedness to this extent may not exist, and the property of the grantor, not subject to the conveyance, may be enough to pay his debts existing at the time of the conveyance, it will not necessarily be good. "If," said Lord Westbury, C.,[2] "the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement. But if a voluntary settlement or deed of gift be impeached by subsequent creditors whose debts had not been contracted at the date of the settlement, then it is necessary to show either that the settlor made the settlement with express intent 'to delay, hinder, or defraud creditors,' or that, after the settlement, the settlor had no sufficient means or reasonable expectation of being able to pay his then existing debts,—that is to say, was reduced to a state of insolvency; in which case the law infers that the settlement was made with intent to delay, hinder, or defraud creditors, and is therefore fraudulent and void. It is obvious that the fact of a voluntary settlor retaining money enough to pay the debts which he owes at the time of making the settlement, but not actually paying them, cannot give a different character to the settlement or take it out of the Statute. It still remains a voluntary alienation or deed of gift, whereby in the event the remedies of creditors are delayed, hindered, or defrauded."

The mere fact that the settlement has in the event prevented a creditor, who was such when it was made, from

[1] See also Skarf *v.* Soulby, 1 Mac. and G., 375; Thompson *v.* Webster, 4 DeG. and J., 600; affd., 7 Jur. (N. S.), 531; Kent *v.* Riley, L. R., 14 Eq., 190; Gnanabhai *v.* Srinivasa Pillai, 4 Mad. H. C., 81.

[2] Spirett *v.* Willows, 3 D. J. and S., 293.

LECTURE II.

obtaining payment of his debt, is not of itself sufficient to enable him to set it aside.[1]

Secured debts.

Although the settlor may be indebted, yet if the debts are secured,[2] or if they do not exceed such ordinary debts as every person must incur, as for instance, for ordinary household expenses, and if the settlor has the means of paying them,[3] the settlement will not be void, and *à fortiori* the settlement will be good, if the settlor was solvent at the time he made it.[4]

Consideration paid to third person.

A conveyance, if otherwise within the Statute, will not be taken out of it merely because the consideration for it is not for the benefit of the grantor, but of another person. Thus, where a person in insolvent circumstances sold his business in consideration, in part, of an annuity to his wife, it was held that the wife was not entitled to the annuity as against her husband's creditors.[5]

Voluntary settlement only void as against existing creditors.

A merely voluntary settlement would seem to be void only as against existing creditors,[6] but subsequent creditors may sue to set it aside if any of the antecedent debtors remain unsatisfied.[7] If it can be shown that the settlor, though indebted at the time he made the settlement, has since paid every debt, it is difficult to say that he executed it with an intention to defeat or delay creditors, since his subsequent payment shows that he had not such an intention.[8]

Unless fraud.

A deed, in fact fraudulent, and executed expressly to hinder and delay future creditors, may be impeached by them, though there were no creditors at the date of the deed, or they have subsequently been paid. And it may be set aside without proof of actual intention to defeat or delay creditors, if the circumstances are such that it would necessarily have that effect.[9]

[1] Freeman *v.* Pope, L. R., 5 Ch., 538. See also Crossly *v.* Elsworthy, L. R., 12 Eq., 158; Mackay *v.* Douglas, L. R, 14 Eq., 106; Cornish *v.* Clark, L. R., 14 Eq., 184; Azim-un-Nissa Begum *v.* Dale, 6 Mad. H. C., 469.

[2] Stephens *v.* Olive, 2 Bro. C. C., 90; Skarf *v.* Soulby, 1 Mac. & G., 375.

[3] Skarf *v.* Soulby, 1 Mac. & G., 375; Lush *v.* Wilkinson, 5 Ves., 387; Kent *v.* Riley, L. R., 14 Eq., 190.

[4] Kent *v.* Riley, L. R., 14 Eq, 190.

[5] French *v.* French, 6 D. M. G., 95; Neale *v.* Day, 4 Jur., N. S., 1225.

[6] Kidney *v.* Coussmaker, 12 Ves., 136; Townsend *v.* Westacott, 4 Beav., 58; Spirett *v.* Willows, 3 DeG. J. and S., 293.

[7] Richardson *v.* Smallwood, Jac., 558; Ede *v.* Knowles, 2 Y and C. C. C., 172; Jenkyn *v.* Vaughan, 3 Drew., 419; Freeman *v.* Pope, L. R., 5 Ch., 538.

[8] Jenkyn *v.* Vaughan, 3 Drew., 425.

[9] Barling *v.* Bishopp, 29 Beav., 417; Reese River Company *v.* Atwell, L. R., 7 Eq., 347; Ware *v.* Gardner, L. R., 7 Eq., 317; Freeman *v.* Pope, L. R., 5 Ch., 538.

It is not necessary that a creditor should have obtained a judgment, lien, decree or charging order; without any of these he may sue to impeach the validity of a fraudulent conveyance. But he must have obtained such a judgment, &c., before he can have execution against the property comprised in the deed.[1]

How far settlement void.

The settlement is only void to the extent necessary to deal with the estate for the satisfaction of the creditors, the creditors of the settlor,[2] and is good as against the grantor and his assignees,[3] parties who assent to, and concur in, it;[4] such as volunteers claiming under him, for instance, devisees[5] and strangers.[6]

In all other respects it is good, and will not be set aside merely because it is voluntary.[7]

If the conveyance or settlement be voidable, the voluntary grantee may, before it is avoided, make a valid transfer to a purchaser for value.[8]

Insolvent Act, s. 9.

The Insolvent Act 11 and 12 Vict., cap. 21, provides, section 9, that if any person who would be deemed a trader liable to become bankrupt, with intent to defeat or delay his creditors, shall make any fraudulent gift, grant, conveyance, delivery, or transfer of any of his lands, tenements, money, goods, or chattels, such an act may be deemed an act of insolvency on which his creditors may petition.

Section 24.

Section 24 of the Insolvent Act provides, "that if any insolvent who shall file his petition for his discharge under the Act, or who shall be adjudged to have committed an act of insolvency, shall voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever to any creditor, or to any other person, in trust, for or to, or for the use, benefit, and advantage of any creditor, every such conveyance, assignment, transfer, charge, delivery, and making over, if made when in in-

[1] Reese River Company *v.* Atwell, L. R., 7 Eq., 347; Colman *v.* Croker, 1 Ves., J., 161; Goldsmith *v.* Russell, 5 D. M. G., 547; Collins *v.* Burton, 4 D. and J., 612.

[2] Curtis *v.* Price, 12 Ves., 89.

[3] Robinson *v.* M'Donnell, 2 B. and Ald., 134.

[4] Olliver *v.* King, 2 Jur., N. S., 312.

[5] Villiers *v.* Beaumont, 1 Vern., 100.

[6] Bessey *v.* Windham, 6 Q. B., 166.

[7] Bill *v.* Cureton, 2 M. and K., 503; De Hoghton *v.* Money, L. R., 1 Eq., 154.

[8] Morewood *v.* South Yorkshire Railway Company, 3 H. and N., 798; Daubeny *v.* Cockburn, 1 Mer., 626.

LECTURE II.

solvent circumstances, and within two months before the date of the petition of such insolvent, or of the petition on which an adjudication of insolvency may have proceeded, as the case may be, or if made with the view or intention, by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his discharge from custody under this Act, or of committing an act of insolvency, shall be deemed, and is hereby declared to be, fraudulent and void as against the assignees of such insolvent."

To constitute a fraudulent preference, two things must concur—1*st*, the act of preference must be voluntary on the part of the debtor; 2*ndly*, it must have been done by him when in such a state of insolvency, as that, it may or must be inferred, that bankruptcy was then in his consideration. And therefore when an assignment or conveyance is made by a debtor to a creditor upon the demand of the latter for payment or security, it will not be fraudulent.[1]

Defrauding purchaser.

The Statute 13 Eliz., cap. 5, with which we have been dealing, relates to creditors. Another Statute of the same reign, which applies in India to the same extent as 13 Eliz., cap. 5[2] (27 Eliz., cap. 4), made perpetual by 30 Eliz., cap. 18, section 3, relates to purchasers. This Statute, in substance, enacts, that all conveyances, grants, charges, leases, estates, incumbrances, and limitations of use or uses, of, in, or out of any lands, tenements, or other hereditaments whatsoever, made for the intent to defraud and deceive such person or persons, bodies politic or corporate, as had purchased, or should purchase, in fee-simple, fee-tail, for life, lives or years, the same lands, tenements, or hereditaments, or any part thereof, or to defraud and deceive such as had or should purchase any rent or commodity in or out of the same or any part thereof, shall be deemed or taken only as against that person and persons, bodies politic and corporate, his and their representatives, and persons claiming under them for good consideration, utterly void, frustrate, and of none effect, any pretence, colour, feigned consideration, to the contrary notwithstanding.

The Statute (s. 4) does not extend to defeat any con-

[1] *Ex parte* Tempest, L. R., 10 Eq., 648; affd., L. R., 6 Ch., 70. As to a loan made on the eve of insolvency, see *In re* Bungseedhur Khettry, I. L. R., 2 Calc., 359; and as to a pledge of goods by an insolvent and re-delivered to him on commission sale, see *In re* Murray, I. L. R., 3 Calc., 58.

[2] See *ante*, p. 59.

veyance, assignment of lease, assurance, grant, charge, lease, estate, interest or limitation of use, of, on, or out of any lands, &c., for good consideration and *bonâ fide.*

Statute does not extend to personal estate.

The Statute does not extend to settlements of personal estate,[1] being in this respect unlike the 13 Eliz., cap. 5; and therefore a voluntary settlement of chattels, personal, will not be defeated by a subsequent sale.[2] Mortgagees[3] and lessees[4] are purchasers *pro tanto;* but a judgment-creditor is not, and has, therefore, no title on that ground to set aside a prior voluntary settlement.[5]

When settlor may defeat settlement.

The settlor himself cannot defeat the settlement by an admission of the receipt of money,[6] and if he has contracted to sell, the contract may be specifically enforced against him;[7] but a Court of Equity will not, as against an unwilling purchaser, assist a vendor to defeat a prior voluntary settlement made by himself, though it will if the purchaser is willing to complete on having a good title,[8] or if there has been part performance by the purchaser receiving possession and payment of part of the purchase-money;[9] and notice to the purchaser of the settlement is immaterial.[10] But the purchaser may sue the vendor and trustees and *cestuis que trustent* to enforce specific performance,[11] though he cannot require the voluntary deed to be delivered up to him to be cancelled.[12] The voluntary grantee has no equity to the purchase-money as against the vendor.[13]

Subsequent purchase must be for value.

To avoid a prior conveyance, however, to a volunteer, the subsequent purchase must be for value, and the consideration must not be grossly inadequate, or a presumption

[1] Jones *v.* Croucher, 1 S. and S., 315.
[2] Bill *v.* Cureton, 2 M. and K., 503; M'Donnell *v.* Hesilrige, 16 Beav., 346; Meek *v.* Kettlewell, 1 Hare. 473.
[3] *Doe v.* Webber, 1 A. and E., 733; Dolphin *v.* Aylward, L. R., 4 H. L., 486; Ede *v.* Knowles, 2 Y. and C. C. C., 173.
[4] Goodright *v.* Moses, 2 W. Bl., 1019.
[5] Beavan *v.* Lord Oxford, 6 D M. G., 507.
[6] *Doe v.* Webber, 1 A. and E., 733.
[7] Buckle *v.* Mitchell, 18 Ves., 100; Dakin *v.* Whimper, 26 Beav., 568. See Azimunnissa Begum *v.* Dale, 6 Mad. H. C., 474.
[8] Smith *v.* Garland. 2 Mer., 123; Clarke *v.* Willott, L. R., 7 Ex., 313; Peter *v.* Nicholls, L. R., 11 Eq., 391.
[9] Peter *v.* Nicholls, L. R., 11 Eq., 391.
[10] Buckle *v.* Mitchell, 18 Ves., 100; *Doe v.* Manning, 9 East, 59.
[11] Daking *v.* Whimper, 26 Beav., 568; Townend *v.* Toker, L. R., 1 Ch., 447.
[12] De Hoghton *v.* Money, L. R., 1 Eq., 154.
[13] Dakin *v.* Whimper, 26 Beav., 568.

LECTURE II.

of fraud and collusion will arise.[1] When the subsequent conveyance is a mortgage, the voluntary grantees will be entitled, subject to the mortgage.[2] There is an exception to the rule in the case of charities, for a voluntary endowment of a charity will not be defeated by a subsequent conveyance for value.[3]

How far voluntary settlement defeated.

The operation of the Statute is to destroy the estates created by the voluntary conveyance as against the purchaser, who cannot, therefore, be affected by the trusts of those estates.[4] But the voluntary settlement will be defeated so far only as may be necessary to give effect to the subsequent conveyance.[5] A purchaser from the heir or devisee of a person who has made a voluntary settlement is not entitled to set aside the settlement.[6]

Personalty settled.

If personalty be settled on certain specified trusts in favour of volunteers, and the trusts are acted upon, the settlement cannot be altered by any subsequent settlement.[7]

Subsequent will.

As a person claiming under a will is a volunteer, a voluntary settlement will not be revoked by a subsequent will disposing of the settled property, even if the object is the payment of the settlor's debts;[8] And a purchase in the name of a wife or child is not within this Statute.[9]

Conveyances with power of revocation.

The 5th section of the Statute 27 Eliz., cap. 4, in substance declares, that if any person shall make any conveyance, gift, grant, devise, charge, limitation of use or assurance of, in or out of any lands, tenements, or hereditaments, with any clause of revocation, determination, or alteration at his will or pleasure, and after such conveyance, gift, &c., shall convey or charge lands, &c., for money or other good consideration—the said first conveyance or grant not being revoked—the said former conveyance, grant, &c., shall, as against those claiming under the latter conveyance, &c, be deemed void.

[1] *Doe v.* Routledge, Cowp., 705; Metcalfe *v.* Pulvertoft, 1 V. & B., 184.
[2] Hales *v.* Cox, 32 Beav., 118.
[3] Corporation of Newcastle *v.* The Attorney-General, 12 C. and F., 402.
[4] Currie *v.* Nind, 1 M. and Cr., 17.
[5] Croker *v.* Martin, 1 Bligh., N. S., 573; Dolphin *v.* Aylward, L. R., 4 H. L., 486.
[6] *Doe v.* Rusham, 17 Q. B., 723; Lewis *v.* Rees, 3 K. and J., 138.
[7] Newton *v.* Askew, 11 Beav., 145; Rycroft *v.* Christy, 3 Beav., 238.
[8] Bale *v.* Newton, 1 Vern., 464; Jeffreys *v.* Jeffreys, Cr. and Ph., 138.
[9] Christy *v.* Courtenay, 13 Beav., 96; Barrack *v.* M'Culloch, 3 K. & J., 110; Drew *v.* Martin, 2 H. and M., 130.

The Act does not apply to mortgages made *bonâ fide* and for value (s. 6). It avoids the first conveyance, though to a purchaser for value,[1] and cannot be evaded by making the exercise of the power apparently conditional, as that the consent of a third person appointed by the grantor shall be obtained.[2]

Effect of Statute.

The reservation of an unlimited power of leasing is in effect a general power of revocation.[3] So, a power to mortgage, unless it be limited to a specified sum upon an estate of much greater value.[4]

A settlement with power of revocation is void as against a subsequent purchaser, although the settlor has released or extinguished the power previously to the sale;[5] unless the release was for value, the settlement containing the power being also for value.[6]

Valuable consideration.

Conveyances or settlements will not be void as against purchasers or creditors if supported by a valuable consideration, except in cases where a power of revocation is reserved to the settlor, the mere *quantum* of consideration is in general not material.[7]

Marriage.

Marriage, according to English law, is a valuable consideration, and will support a settlement.[8] Though, as a general rule, a settlement after marriage even upon a wife or children is voluntary, there being merely a moral consideration which will not support a promise or settlement.[9] But an additional portion received by the wife after the marriage will support a post-nuptial settlement on her and her children.[10]

A release by a wife of the past income of property settled to her separate use, or her concurrence in a particular settlement,[11] or the release of her jointure,[12] or right

[1] Hungerford *v.* Earle, 2 Vern., 261.
[2] Standen *v.* Bullock, 3 Rep., 82, *b*; Lavender *v.* Blackston, 3 Keb., 527.
[3] Lavender *v.* Blackston, 3 Keb., 527.
[4] Jenkins *v.* Keymis, 1 Lev., 150.
[5] Bullock *v.* Thorne, cited in Sug. V. & P., 722.
[6] Sug. V. and P., 722.
[7] Townsend *v.* Toker, L. R., 1 Ch., 446; Bayspoole *v.* Collins, L. R., 6 Ch., 228.
[8] Ford *v.* Stuart, 15 Beav., 499; Fraser *v.* Thompson, 4 D. and J., 661.
[9] Jeffrey *v.* Jeffrey, 1 Cr. and Ph., 138; Moore *v.* Crofton, 3 J. and Lat., 438.
[10] Ward *v.* Shallett, 2 Ves., 18; Ramsden *v.* Hylton, *ibid*, 308.
[11] Harman *v.* Richards, 10 Hare, 81.
[12] Ball *v.* Burnford, Prec. Ch., 113.

LECTURE II.

of dower,[1] or a charge by her upon her own estate,[2] will support a settlement by her husband. So the payment of the settlor's debts by a third person is a good consideration for a settlement upon his wife and children,[3] and a loan to him will be a good consideration for a settlement upon himself for life with remainder to his children.[4]

So if a person incur expenses on the faith of a settlement, and in addition enters into a covenant to indemnify the settlor against certain incumbrances, there will be a good consideration for a settlement.[5]

The release or surrender of a voluntary bond is a good consideration to support a substituted bond, unless with a fraudulent design, as by an insolvent to substitute an available security for one that could not avail against creditors.[6]

Settlements founded upon immoral considerations are of course void. See *ante*, p. 48.

Extrinsic evidence admissible to show consideration.

A settlement in form voluntary may be shown from extrinsic evidence to have been made for valuable consideration.[7] And, if necessary, an inquiry may be directed as to whether the settlement was founded on any and what valuable consideration, for the consideration need not actually appear.[8]

In Bayspoole v. *Collins*,[9] the owner of property, which was worth, beyond an incumbrance to which it was subject, about £1,300, was persuaded by *A*, a relative of his wife, to make a post-nuptial settlement of it on his wife and children. As an inducement to do this, *A* lent him £150 on his promissory note. The settlement was executed, but no mention was made in it of the advance of £150. It was held, that the loan was a sufficient valuable consideration to support the settlement against a subsequent mortgagee of the settlor.

A conveyance to a trustee in trust to pay the debts of the grantor, although it may be void as regards them, will,

[1] Jones *v.* Boulter, 1 Cox, 288.
[2] Lady Arundel *v.* Phipps, 10 Ves., 139.
[3] Holmes *v.* Penny, 3 K. and J., 90 ; Scott *v.* Scott, 4 H. L. Cas., 1065.
[4] Thompson *v.* Webster, 7 Jur., N. S., 531.
[5] Townend *v.* Toker, L. R., 1 Ch., 446.
[6] *Ex parte* Berry, 19 Ves., 218.
[7] Pott *v.* Todhunter, 2 Coll., 76.
[8] Kelson *v.* Kelson, 10 Hare, 385 ; Gully *v.* The Bishop of Exeter, 2 Moo. and P., 266 ; Mildmay's case, 1 Rep., 176 ; Leifchild's case, L. R., 1 Eq., 231 ; Tull *v.* Parlett, M. and M., 472.
[9] L. R., 6 Ch., 228.

nevertheless, entitle the assignee to take proceedings against persons in possession of the property which is assigned.[1]

Settlement not set aside as against grantors.

Where a settlement or conveyance, whether by transfer of property or declaration of trust respecting it, is effectual, and not open to objection upon any of the foregoing grounds, the grantor cannot avoid it, nor will the Court set it aside. Although the Court will not assist the completion of voluntary deeds, it does not lay down, as a rule, that they are always void; the mere alteration of intention is not sufficient to induce the Court to interfere and cancel an instrument which was fully understood and deliberately executed by the grantor.[2]

And a settlement will not be revoked though the trustees of the property re-convey it to the grantor,[3] in which case they will be guilty of a breach of trust.[4]

So the settlement will remain in force, though the settled property may come back into the hands of the settlor.[5]

Voluntary settlement in expectation for death.

In *Forshaw* v. *Welsby*[6] it was held, that a voluntary settlement containing no power of revocation, made by a person in expectation of death, ought to be set aside at his instance, as it was not intended to be operative in the event of his recovery. Each case, however, must depend upon its own circumstances. The absence of a power of revocation in voluntary settlements is an important circumstance in considering them. When they are not intended to be irrevocable, such a power should be inserted. Where it is wanting, the argument is usually urged that the non-insertion is contrary to the intention of the settlor, particularly where the settlement is for the benefit of persons to be ascertained at a future time.[7]

The party taking a benefit under a voluntary settlement or gift containing no power of revocation has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irre-

[1] Glegg *v.* Rees, L. R., 7 Ch., 71.

[2] Bill *v.* Cureton, 2 M. and K, 503; Toker *v.* Toker, 31 Beav., 629; affd., 3 DeG. J. and S., 487; Shafto *v.* Adams, 4 Giff., 492.

[3] Ellison *v.* Ellison, 6 Ves., 656; Smith *v.* Lyne, 2 Y. and C. C. C., 345; Paterson *v.* Murphy, 11 Hare, 88.

[4] M'Donnell *v.* Hesilrig, 16 Beav., 346.

[5] Smith *v.* Lyne, 2 Y. and C. C. C., 345; Gilbert *v.* Overton, 2 H. and M., 110.

[6] 30 Beav, 243: and see Phillips *v.* Mullings, L. R., 7 Ch., 244.

[7] Forshaw *v.* Welsby, 30 Beav., 243: and see Nanney *v.* Williams, 22 Beav., 452; Hall *v.* Hall, L. R., 8 Ch., 430.

LECTURE II.

vocable: and where the circumstances are such that the donor ought to be advised to retain a power of revocation, it is the duty of a solicitor to insist upon the insertion of such a power, and the want of it will, in general, be fatal to the deed.[1]

Rectifying settlement.

The Court will not rectify a voluntary settlement at the instance either of the grantor or of the grantee, unless there has been a mistake common to all parties:[2] and where it does not express the intention of the parties, and is impeached, it cannot be reformed except with the consent of the donor.[3]

The mere retention of the instrument of settlement or gift by the settlor is immaterial, if there is nothing to show that the settlor did not intend it to operate immediately.[4]

Enforcement.

So is its destruction and the non-communication of its contents to the trustees or *cestui que trust*,[5] and if found cancelled among the papers of the grantor after his death, it will be enforced against his representatives upon the presumption that it was improperly cancelled.[6]

An instrument vesting property in trustees for the benefit of the grantor for his life, and after his decease, for the benefit of other persons, with a power of revocation, is valid, and is not testamentary.[7]

On whom binding.

A settlement complete and valid, having regard to the abovementioned rule, is binding on the settlor or grantor, and on his heirs and legal representatives and devisees,[8] and persons claiming under them though for value.[9]

A person who takes by title paramount to the settlement, who does no act to repudiate it, will, in general, be considered to have acquiesced in it.[10]

All who claim under the instrument or trust are entitled to the benefit of it, and a settlement in favour of

[1] Coutts *v.* Ackworth, L. R., 8 Eq., 558. See Prideaux *v.* Lonsdale, 1 D. J. and S., 433; Woollaston *v.* Tribe, L. R., 9 Eq., 44.

[2] Bentley *v.* Mackay, 31 Beav., 143; Broun *v.* Kennedy, 33 Beav., 133; Thompson *v.* Whitmore, 1 J. and H., 268; Lister *v.* Hodgson, L. R., 4 Eq., 30.

[3] Phillipson *v.* Kerry, 32 Beav., 628.

[4] *Doe v.* Knight, 5 B. and C., 671.

[5] Fletcher *v.* Fletcher, 4 Hare, 67; *Re* Way, 2 D. J. and S., 365.

[6] Sluysken *v.* Hunter, 1 Mer., 40.

[7] Tompson *v.* Brown, 3 M. and K., 32.

[8] Jeffreys *v.* Jeffreys, Cr. and Ph., 138; Hales *v.* Cox, 32 Beav., 118; Gilbert *v.* Overton, 2 H. and M., 110.

[9] Lewis *v.* Rees, 3 K. and J., 132; *Doe v.* Rusham, 17 Q. B., 723.

[10] Thompson *v.* Finch, 22 Beav., 316.

unborn children is, according to English law, binding and irrevocable unless a power of revocation be reserved.[1]

Creditors' deeds how far revocable.

A question frequently arises how far deeds for the payment of creditors are revocable. As to this it has been held, that a conveyance for the benefit of creditors is revocable if it has not been communicated to them,[2] but not if communicated to them, or some of them, and they assent to it.[3] A conveyance even to one creditor in trust for himself and others cannot be revoked after it has been communicated to him unless he has dissented.[4]

Johns. v. James.

The principles applicable to creditors' deeds were fully discussed by the Lords Justices in the recent case of *Johns* v. *James*.[5] There a debtor conveyed all his property to the defendants upon trust to pay thereout a sum of £5,000, which they were to raise on his behalf, and all other debts due from the assignor, including a debt due to the plaintiff. The defendants realized the property of the assignor, and alleged that they had paid some of the debts out of the proceeds. The plaintiff brought an action against the defendants, asking for an account of the property, and that the debts of the plaintiff and the other creditors might be satisfied thereout. The statement of claim contained no allegation that the assignment had been communicated to the plaintiff. It was held, that the defendants were not trustees for the plaintiff. James, L. J., said :—"It appears to me to be too late now to question the principle of *Garrard* v. *Lord Lauderdale*.[6] That case seems to me to have proceeded upon the plainest notion of common sense. It is quite obvious that a man in pecuniary difficulties having a great number of debts which he could not meet, might put his property in the hands of certain persons to realize and pay the creditors in the best way they could. It was held by the Vice-Chancellor, and it has been affirmed, that really after all that is only making those particular persons who are called trustees his agents or attorneys. There might be a power-of-attorney from him to realize all his property, and relieve him from the difficulties he was in. If it were

[1] Petre *v.* Espinasse, 2 M. and K., 496 ; Bill *v.* Cureton, *ib.*, 503.
[2] Acton *v.* Woodgate, 2 M. and K., 492 ; Walwyn *v.* Coutts, 3 Mer., 707 ; Browne *v.* Cavendish, 1 J. and L., 606.
[3] Griffith *v.* Ricketts, 7 Hare, 307 ; Nicholson *v.* Tutin, 2 K. and J., 18 ; Bamonji Manikiji *v.* Maroj Palanji, 1 Bom. H. C., 233.
[4] Siggers *v.* Evans, 5 E. and B., 367 ; Montefiore *v.* Brown, 7 H. L. C., 241.
[5] L. R., 8 Ch. Div., 744. [6] 2 R. and M., 451.

LECTURE II.

Johns v. James.

supposed that such a deed as that created an absolute irrevocable trust in favour of everyone of the persons who happened at the time to be a creditor, the result might have been very often monstrous. It would give him no opportunity of paying a creditor who was pressing; no opportunity of settling an action; no opportunity of getting any goods for himself or his family the next day, or redeeming property pledged. So, where there was an actual conveyance on trust, it was held in *Wallwyn* v. *Coutts*,[1] that where it was for all the creditors, it must be assumed from the very nature of the transaction, and from the position of the assignor, that it was a thing for his own benefit, and not for the benefit of numbers of persons whom the trustees would probably have no means of ascertaining, and whose debts the trustees would probably have no means of knowing. If you once assumed that this was an absolute trust in favour of every creditor, every person who had a right to claim to be a creditor, or had some demand against him, everyone of those might have filed a bill, and the unfortunate trustee under those circumstances (who might have acted the part of a friend to the impecunious person) might have been liable to a thousand bills in Chancery, for he could not stop any of them until a decree was made in favour of all the creditors.

Those are some of the reasons that appear to me to have led the Court to say that such a deed as this is to be construed as a mandate, the same sort of mandate that a man gives when he gives his servant money, with directions to pay it in a particular way; it does not create any equitable or legal right in favour of a particular creditor. The right to the direction of the money is the right of the person who has put the money in the hands of his agent or steward, or whoever he may be. *Wallwyn* v. *Coutts*[1] laid that down as the law where the deed was for creditors generally. *Garrard* v. *Lord Lauderdale*[2] only extended it to the case where the names of the creditors were scheduled, and the amounts due were scheduled, and that was held not to make any difference; and from that time to this I believe that has been the doctrine of the Court. The deed itself does not create a trust in favour of all and every or any of the creditors. But circumstances may have occurred, circumstances may have existed, which did make the

[1] 3 Mer., 707. [2] 2 R. and M., 451.

assignment a trust or an obligation in favour of some particular person. If the creditor has executed the deed himself, and been a party to it, and assented to it—if he has entered into obligations upon the faith of the deed, of course that gives him a right, just as in the case where a man receives money from a person, on a direction from his creditor to pay some other person instead of paying him, and he communicates it to this person. The person to whom he communicates it of course has a legal right to have the money so applied, but that does not enure for the benefit of any other person or persons to whom no such communication has been made. It seems to me that on principle you cannot create a right in *A* where the deed has not given him a right, because something has occurred giving *B* a right, who originally was in the same position as *A*. That was in fact the principle of the decision in *Acton* v. *Woodgate*,[1] for in that case there being beyond all question a trust deed in favour of all the creditors, including certain *post obit* creditors, whom the settlor was afterwards minded not to put on the same footing as his other creditors, the settlor directed that they should be excluded from the benefit of the deed; and it was held by the Court that it was perfectly in his power to do so, and the deed remained still as a deed to be executed in favour of all the creditors except the *post obit* creditors, and they were not *cestuis que trustent* by the deed. It has been called a partial revocation. It is not a case of revocation in one sense; you cannot revoke the deed, and cannot get the property out of the hands of the trustee until, at all events, you have satisfied all the charges and expenses he has incurred, and any right he has acquired in the property. It is not a revocation of the deed, but it is a revocation of the directions given by the deed to the assignor's agent as to what he shall do with the proceeds. It appears to me that this is clearly a case of the same kind as *Wallwyn* v. *Coutts*,[2] and *Garrard* v. *Lord Lauderdale*,[3] *viz.*, the case of a creditor to whom no communication has been made, who has never been induced to act by anything that occurred by reason of the execution of the deed."

Execution of deed by creditors.

If a time be limited for the execution of the deed by the creditors, those who refuse to execute it will be excluded

[1] 2 My. & K., 192. [2] 3 Mer., 707. [3] 2 R. & My., 451.

LECTURE II.

from its benefits.[1] So if they claim adversely to it,[2] or act inconsistently with it.[3] And a creditor cannot be said to have acceded to the provisions of a composition deed unless he has put himself in the same situation with regard to the debtor as if he had actually executed the deed.[4]

But mere delay in executing the deed by creditors who nevertheless act under it will not disentitle them to participate in its benefits,[5] if they do eventually execute the deed or show in some way that they accept it.[6]

A creditor having security, who assents to, and executes, the deed, which contains a release by the creditors of the debts due to them, must share rateably with the other creditors and give up his security, unless the deed provides for his retaining it.[7]

Deed not communicated to creditors.

If there has been no communication to creditors, the trust, if not fully executed at the time of the settlor's death, would seem then to be at an end, subject to any special interest of the trustee himself; but not if the deed has been communicated to the creditors and acted upon, as this would constitute them *cestuis que trustent*, and make the deed irrevocable.[8]

Trust by will for payment of debts.

A trust by will for the payment of the debts of a third person in the discretion of trustees applies, it has been held, for the benefit of creditors subsequent to the death of the testator.[9] A debt barred by limitation will not be revived by a direction to pay debts;[10] but if not barred at the date of the deed or time of the death, the trust will prevent the operation of the Statute afterwards.[11]

A trustee of an estate devised for payment of debts, although he is executor, has no right of retainer, but must share rateably with the other creditors.[12]

[1] Johnson *v.* Kershaw, 1 DeG. & Sm, 260.
[2] Watson *v.* Knight, 19 Beav., 369.
[3] Field *v.* Lord Donoughmore, 1 Dr. & War., 227.
[4] Forbes *v.* Limond, 4 D. M. G., 298.
[5] Nicholson *v.* Tutin, 2 K. & J., 18; Raworth *v.* Parker, *ib.*, 163; Whitmore *v.* Turquand, 3 D. F. & J., 107; *Re* Baber's Trust L. R., 10 Eq., 554.
[6] Biron *v.* Mount, 24 Beav., 642.
[7] Buck *v.* Shippam, 1 Ph., 694; Cullingworth *v.* Loyd, 2 Beav., 385. As to the case of a creditor having the security of a surety, who himself holds security of the debtor, see Midland Bank *v.* Chambers, L. R., 4 Ch., 398.
[8] Harland *v.* Binks, 15 Q. B., 713; Cosser *v.* Radfords, 1 D. J. & S., 585; Siggers *v.* Evans, 5 E. & B., 367; Wilding *v.* Richards, 1 Coll., 655.
[9] Joel *v.* Mills, 7 Jur., N S., 389.
[10] Burke *v.* Jones, 2 V. & B., 275; Joel *v.* Mills, 7 Jur., N. S., 389.
[11] Crallan *v.* Oulton, 3 Beav., 1. [12] Bain *v.* Sadler, L. R., 12 Eq., 570.

LECTURE III.

IMPLIED AND RESULTING TRUSTS.

Implied Trusts — Precatory Trusts — Objects, property, and trust must be described — Words of recommendation and entreaty — Intention to give absolutely — Intermediate class of cases — Maintenance — Agreement to settle property — Vendor trustee for vendee — Resulting Trusts — Undisposed of interest — Excluding heirs — Parol evidence to rebut presumption — Illegal purpose — Trust to sell — Trusts vague — No trust declared — Trust declared of part only of estate — Transfer of stock or money into name of another — Purchase in name of trustees — Purchase in name of stranger — Expression of wish — Delay — Rule applies to joint purchase — To personal as well as real estate — Purchase in fictitious name — Parol evidence admissible on part of person paying purchase-money — Parol evidence on behalf of person to whom conveyance made — To rebut presumption as to part of the property — Statute of Frauds — Conveyance to stranger without consideration — Purchases in the name of a wife or child no resulting trust — Reputed wife — Person *in loco parentis* — Purchase by a mother — Purchase in name of nephew — Fiduciary relationship — Purchases void as against creditors — Rules apply to personal estate — Surrounding circumstances to be considered — Purchase-money unpaid — Joint tenancy when created — Purchase in the name of a child and a stranger — Evidence to rebut presumption of advancement — Subsequent acts and declarations — Possession by father — Dividends received by father — Devise, bequest, or lease — Child fully advanced.

Implied trusts.

HITHERTO we have dealt with express trusts only. A person, however, may show an intention to create a trust, and this will be carried out by the Court by means of an implied trust.

The general rule as to implied trusts is thus laid down by Mr. Lewin,[1]—"Wherever a person having a power of disposition over property, manifests any intention with respect to it in favour of another, the Court, where there is sufficient consideration, or in a will where consideration is implied, will execute that intention through the medium of a trust, however informal the language in which it happens to be expressed."

[1] Lewin on Trusts, 7th Ed., p. 118.

LECTURE III.

Precatory Trusts.

An implied trust may be created in a will or deed[1] by words expressive of recommendation, direction, or entreaty, as where the author of the trust gives property and directs,[2] confides,[3] or trusts and confides,[4] hopes,[5] doubts not,[6] recommends,[7] well knows,[8] entreats,[9] desires,[10] or wills and desires,[11] requests,[12] or wishes and requests,[13] or requires and entreats,[14] wills,[15] wishes and desires,[16] most heartily beseeches,[17] orders and directs,[18] authorizes and empowers,[19] is well assured,[20] has the fullest confidence,[21] trusts,[22] well knows,[23] has full assurance and confident hope,[24] is under the firm conviction,[25] or in the full belief,[26] or expresses his belief, that the legatee will give[27] the property in a particular manner. In such cases the Court will enforce the implied trust in favour of the person named or indicated,[28]

[1] Liddard *v.* Liddard, 28 Beav., 266. [2] White *v.* Briggs, 2 Ph., 583.

[3] Griffiths *v.* Evans, 5 Beav., 241 ; Shepherd *v.* Nottige, 2 J. & H., 766.

[4] Wood *v.* Cox, 1 Ke., 317 ; Palmer *v.* Simmonds, 2 Drew., 224 ; Macnab *v.* Whitbread, 17 Beav., 299 ; Pilkington *v.* Boughey, 12 Sim.. 414.

[5] Harland *v.* Trigg, 1 Bro. C. C., 142.

[6] Paul *v.* Compton, 8 Ves., 380 ; Parsons *v.* Baker, 18 Ves., 476 ; Taylor *v.* George, 2 V. & B., 378 ; Sale *v.* Moore, 1 Sim., 534.

[7] Horwood *v.* West, 1 S. & S., 387 ; Paul *v.* Compton, 8 Ves., 380 ; Tibbits *v.* Tibbits, 19 Ves., 656 ; Malim *v.* Keighley, 2 Ves. J., 335 ; Hart *v.* Tribe, 18 Beav., 215 ; Meggison *v.* Moore, 2 Ves. J., 630 ; Meredith *v.* Heneage, 1 Sim.. 553.

[8] Briggs *v.* Penny, 3 Mac. & G., 546.

[9] Prevost *v.* Clarke, 2 Mad., 458 ; Meredith *v.* Heneage, 1 Sim., 553 ; Taylor *v* George, 2 V. & B., 378.

[10] Harding *v.* Glyn, 1 Atk., 469 ; Bonser *v.* Kinnear, 2 Giff., 195 ; Cary *v.* Cary, 2 Sch. and Lef., 189.

[11] Eeles *v.* England, 2 Vern., 466 ; Birch *v.* Wade, 3 V. & B., 198 ; Forbes *v.* Ball, 3 Mer., 437.

[12] Pierson *v.* Garnett, 2 Bro. C. C., 38, 226 ; Bernard *v.* Minshull, Johns, 276.

[13] Foley *v.* Parry, 2 M. & K., 138 ; Bernard *v.* Minshull, Johns, 276.

[14] Taylor *v.* George, 2 V. & B., 378.

[15] Eales *v.* England, Pr. Ch., 200 ; Clowdsley *v.* Pelham, 1 Vern., 411.

[16] Liddard *v.* Liddard, 28 Beav., 266.

[17] Meredith *v.* Heneage, 1 Sim., 553.

[18] Cary *v.* Cary, 2 Sch. & Lef., 189 ; White *v.* Briggs, 2 Ph., 583.

[19] Brown *v.* Higgs, 4 Ves., 708 ; affd., 18 Ves., 192.

[20] Macey *v.* Shumer, 1 Atk., 389 ; Ray *v.* Adams, 3 M. and K., 237.

[21] Shovelton *v.* Shovelton, 32 Beav., 143 ; Curnick *v.* Tucker, L. R., 17 Eq., 320 ; Le Marchant *v.* Le Marchant, L. R., 18 Eq., 414.

[22] Irvine *v.* Sullivan, L. R., 8 Eq., 673.

[23] Briggs *v.* Penny, 3 Mac. and G., 546.

[24] Macnab *v.* Whitbread, 17 Beav., 299.

[25] Barnes *v.* Grant, 2 Jur., N. S., 1127.

[26] Fordham *v.* Spreight, 23 W. R. (Eng.), 782.

[27] Robinson *v.* Smith, 6 Madd., 194 ; Clifton *v.* Lombe, Amb., 519 : but see Lechmere *v.* Lavie, 2 M. & K., 198.

[28] Knight *v.* Knight, 3 Beav., 148, 172.

and compel the person in whom the confidence is reposed to give effect thereto.

Objects, property, and trust must be described.

The property must be described with certainty.[1] For the objects, property, and way in which it shall go must be pointed out.[2]

For instance, a bequest of property to a certain person "hoping that he will continue it in the family," does not create a trust, as the beneficiary is not indicated with reasonable certainty.[3] So, for the same reason, a bequest to *A* requesting him to distribute it amongst such members of *B's* family as *B* shall think most deserving, does not create a trust.[4] Again, a bequest to *A* desiring him to divide the bulk of it among *B's* children, does not create a trust, for the trust property is not indicated with sufficient certainty;[5] and a bequest of a shop and stock-in-trade to *A* on condition that he pays the testator's debts and a legacy to *B*, is a condition and not a trust for the testator's creditors and *B*.[6] So also a direction to remember certain persons without specifying any sum or property,[7] or to make ample provision for them,[8] to give what shall remain at the legatee's death,[9] or to divide and dispose of the savings,[10] to consider certain persons,[11] or to be kind to them,[12] will not create a trust.

Words of recommendation and entreaty.

Such words and expressions, however, as have been mentioned, particularly where they indicate recommendation or entreaty, are of a flexible character, and will not create a trust, if that is inconsistent with other positive provisions in the will.[13] And words of expectation do not amount to a recommendation, and do not create a trust.[14]

[1] Lechmere *v.* Lavie, 2 M. & K., 197; Russell *v.* Jackson, 10 Hare, 213; Palmer *v.* Simmonds, 2 Drew, 221.

[2] Malim *v.* Keighley, 2 Ves. J., 335; Briggs *v.* Penny, 3 Mac. & G., 546; Bernard *v.* Minshull, Johns, 276.

[3] Harland *v.* Trigg, 1 Bro. C. C., 142.

[4] Green *v.* Marsden, 1 Drew, 646; White *v.* Briggs, 2 Ph., 583.

[5] Palmer *v.* Simmonds, 2 Drew, 221.

[6] Messenger *v.* Andrews, 4 Russ., 478.

[7] Bardswell *v.* Bardswell, 9 Sim., 319.

[8] Winch *v.* Brutton, 14 Sim., 379; Fox *v.* Fox, 27 Beav., 301.

[9] Lechmere *v.* Lavie, 2 M. & K., 197.

[10] Cowman *v.* Harrison, 10 Hare, 234.

[11] Sale *v.* Moore, 1 Sim.. 534; Hoy *v.* Master, 6 Sim., 568.

[12] Buggins *v.* Yates, 9 Mod., 122.

[13] Knott *v.* Cottee, 2 Ph., 192; Young *v.* Martin, 2 Y. & C C. C., 582; Hood *v.* Oglander, 34 Beav., 513; Scott *v* Key, 35 Beav., 291; Eaton *v.* Watts, L. R., 2 Eq., 51.

[14] Lechmere *v.* Lavie, 2 M. & K., 197.

LECTURE III.

Intention to give absolutely.

If it is clear that the author of the trust intended that the devisee should take absolutely, precatory words will not cut down the absolute gift, and create a trust; they are then regarded merely as the expression of a wish.[1] Thus where property is given to *A* for his own use, benefit, and disposal absolutely, the author of the trust nevertheless conjuring,[2] desiring,[3] or recommending[4] him to make a particular disposition, no trust will be created.[5]

If a testator has, by his will, recommended or desired that a particular person shall be employed as an agent or manager of an estate, or the like, this will not in general impose a trust or obligation upon the devisee of the estate.[6]

Intermediate class of cases.

There would seem to be an intermediate class of cases between those in which the Court holds that a trust has been created and those in which it holds that it has not been created. Thus there may be an absolute gift subject only to the performance of a particular trust, and the Court may look *dehors* the will to see what the trust is. In *Irvine* v. *Sullivan*[7] the testator bequeathed his property to *A* absolutely, trusting that she would carry out his wishes, but there was no further reference to them in the will. *A* had written down what the testator desired to give to various persons; but the paper had not been seen by the testator. It was held that *A* took beneficially subject to the performance of the testator's wishes.[8]

Maintenance.

Occasionally the trusts of a will with reference to the maintenance of children are so ambiguous that it is doubtful whether the testator meant to create a trust, or merely to indicate the motive of the gift. Thus, if a legacy be given to a father that he may support himself and his children,[9] or better to enable him to provide for his children,[10] or to assist his children or the like,[11] or if a legacy be given

[1] Meredith *v.* Heneage, 1 Sim., 542; Wood *v.* Cox, 2 My. & Cr., 684.
[2] Winch *v.* Bruton, 14 Sim., 379.
[3] McCulloch *v.* McCulloch, 11 W. R. (Eng.), 504.
[4] Johnston *v.* Rowlands, 2 DeG. and Sm., 356.
[5] See also Webb *v.* Wools, 2 Sim., N. S., 267; Abraham *v.* Alman, 1 Russ., 509; Reeves *v.* Baker, 18 Beav., 373.
[6] Lawless *v.* Shaw, 5 C. & F., 129; Finden *v.* Stephens, 2 Ph., 142; Williams *v.* Corbet, 8 Sim., 349.
[7] L. R., 8 Eq., 673.
[8] See also Wood *v.* Cox, 2 M. & C., 684; Bernard *v.* Minshull, Johns, 276; McCormick *v.* Grogan, L. R., 4 H. L., 82.
[9] Thorp *v.* Owen, 2 Hare, 607.
[10] Brown *v.* Casamajor, 4 Ves., 498; Wetherell *v.* Wilson, 1 Keen, 80.
[11] Benson *v.* Whittam, 5 Sim., 22.

to *A* to maintain and bring up *B*,[1] the gift is absolute without any trust or obligation being imposed on the legatee. So no trust is created when there is an absolute gift, having full confidence that the legatee will make sufficient and judicious provision for the children,[2] or will husband the means left for the children.[3] But a bequest of the income of property that the legatee may use or dispose of it for the benefit of himself and the maintenance and education of his children, in general, creates a trust, not exclusively, however, for the children, but for the parent and children.[4] The trust is imperative to this extent, that the parent must perform the obligation. Provided he does this, he may retain any surplus beyond what is required for this purpose, for himself, and is not bound to account for the application of the fund.[5] But failing in the performance of the trust he will not be allowed to receive the income.[6] Where there is a bequest of a fund to *A* for the maintenance of her children, and there are none, she will herself be entitled to the income.[7] So also if they have since died.[8] The obligation to maintain the children, if there are any, will not be at an end when they attain twenty-one or marry. Whether it would, if they ceased to reside under the parent's roof, is doubtful.[9] The cases on this point are conflicting.[10]

In *Scott* v. *Key*,[11] under a bequest to the testator's widow to be at her sole and entire disposal for the benefit of herself and children, it was held, that the trust for maintenance did not cease absolutely on a daughter, an only child, attaining twenty-one and marrying; but that on her becoming a widow and requiring maintenance, she would be entitled to it.

[1] Biddles *v.* Biddles, 16 Sim., 1; Jones *v.* Greatwood, 16 Beav., 527; Wheeler *v.* Smith, 1 Giff., 300.

[2] Fox *v.* Fox, 27 Beav., 301. [3] Scott *v.* Key, 35 Beav., 291.

[4] Woods *v.* Woods, 1 My. & Cr., 401; Byne *v.* Blackburn, 26 Beav., 41; Carr *v.* Living, 28 Beav., 644; Berry *v.* Briant, 2 Dr. & Sm., 1; Bird *v.* Maybury, 33 Beav., 351.

[5] Hora *v.* Hora, 33 Beav., 88.

[6] Castle *v.* Castle, 1 DeG. & J., 352.

[7] Hammond *v.* Neame, 1 Swanst., 35.

[8] Bushnell *v.* Parsons, Prec. Ch., 219.

[9] Longmore *v.* Elcum 2 Y. & C. C. C., 363; Staniland *v.* Staniland, 34 Beav., 536.

[10] See also Bowden *v.* Laing, 14 Sim., 113; Carr *v.* Living, 28 Beav., 644; Thorp *v.* Owen, 2 Hare, 612.

[11] 11 Jur., N. S., 819.

LECTURE III.

A direction that *A* shall reside with and be maintained by *B*, will not be enforced as a trust in the event of *A* not choosing to reside with *B*, and although *A* may reside with *B*, the trust will terminate at the death of the latter.[1] Where an annuity was given to the testator's widow (in addition to another provision for her) as long as she and her son should live together, but if they ceased to live together it should cease, it was held that the annuity did not terminate upon the son's death in the widow's lifetime.[2] There are cases, however, somewhat varying in terms from those just noticed in which the Court has come to the conclusion that the trustee or parent was not intended to take any interest. As if there is a gift to *A* to dispose of among his children,[3] or the better to enable him to maintain his children until their shares should become payable.[4]

Again, the terms of the bequest may show that the parent or trustee was intended to take jointly, or in common, with the other objects of the trust, as where a fund is given to a parent with her children for their joint maintenance.[5] And where the bequest was to the testator's wife for the use and benefit of herself and all his children by her, or by a former wife, it was held that the widow and children took as joint tenants.[6] In some cases it has been held, that where there is a gift to a parent to be disposed of for the benefit of himself or herself and children, the parent takes an estate for life with a power of disposition in favour of the children.[7] But this cannot be relied upon as a general rule. Where a testator gave a house and all his estate to his widow "to be at her disposal in any way she may think best for the benefit of herself and family," and the widow gave part to an illegitimate son of one of the testator's children, the gift was held valid. The Lords Justices without absolutely

[1] Wilson *v.* Bell, L. R., 4 Ch., 581.
[2] Sutcliffe *v.* Richardson, L. R., 13 Eq., 606.
[3] Blakeney *v.* Blakeney, 6 Sim., 52.
[4] Wetherell *v.* Wilson, 1 Keen, 80; Brown *v.* Casamajor, 4 Ves., 498.
[5] Wilson *v.* Maddison, 2 Y. and C. C. C., 372; Bibby *v.* Thompson, 32 Beav., 646.
[6] Newill *v.* Newill, 7 W. N., 25; Bellasis' Trusts, L. R., 12 Eq., 218.
[7] See Crockett *v.* Crockett, 2 Ph., 553; Costabidie *v.* Costabidie, 6 Hare, 410; Gully *v.* Cregoe, 24 Beav., 185; Jeffrey *v.* DeVitre, *ib.*, 296; Shovelton *v.* Shovelton, 32 Beav., 143; Armstrong *v.* Armstrong, L. R., 7 Eq., 518.

deciding the question, seem to have had little or no doubt that no trust at all was created by the testator's will.[1]

Agreement to settle property.

An implied trust will arise when a person agrees for valuable consideration to settle certain property, whether moveable or immoveable,[2] and the property may be followed into the hands of a third person.[3]

Vendor trustee for vendee.

So if a person enters into a valid contract for the sale of property, he is from that time a trustee of the property for the purchaser, and must account for the rents and profits, and will be liable in damages if he neglects the property, for being a trustee he is bound to take care of the trust estate, and commits a breach of trust if he does not do so.[4]

Resulting Trusts.

The next class of trusts to consider are those created by operation of law. These again may be subdivided into resulting trusts and constructive trusts. I will first deal with the rules of English law as to resulting trusts, and then with benami transactions. When the instrument creating the trust, whether a deed or will, does not direct how the whole of the property, made subject to the trust, is to be disposed of, the undisposed of interest results to the settlor or his heirs or representatives.[5] If a will fails to make an effectual and complete disposition of the whole of the testator's real and personal estate, the undisposed of interest devolves upon the person or persons on whom the law, in the absence of disposition, casts that species of property. So on the same principle, where lands are devised upon particular purposes, as for payment of debts, or with a direction to pay to *A* for life, and no further trust is declared, all the unexhausted beneficial interest results to the heir. This doctrine is so well settled, that if the character of trustee be plainly and unequivocally affixed to the devisee, no question can be raised respecting its application; but the difficulty in these cases generally is to determine whether it is intended that the interest

Undisposed of interest.

[1] Lambe *v.* Eames, L. R., 6 Ch., 597. See also Mackett *v.* Mackett, L. R., 14 Eq., 49.

[2] Kennedy *v.* Daly, 1 Sch. and Lef., 355; Wellesley *v.* Wellesley, 4 M. & Cr., 561; Lyster *v.* Burroughs, 1 Dr. and Wal., 149.

[3] Lewis *v.* Madocks, 8 Ves., 150.

[4] Acland *v.* Gaisford, 2 Madd., 32; Wilson *v.* Clapham, 1 J. and W., 38; Ferguson *v.* Tadman, 1 Sim., 530; Foster *v.* Deacon, 3 Madd., 394. See further Lewin, 7th Ed., 128, 129.

[5] Culpepper *v.* Aston, 2 Ch. Cas., 116; Cook *v.* Gwavas, cited in Roper *v.* Radcliffe, 9 Mod., 187; Lloyd *v.* Spillett, 2 Atk., 150; Cottington *v.* Fletcher, *ib.*, 156; Northen *v.* Carnegie, 4 Drew, 587; Mapp *v.* Elcock, 3 H. L. C., 492.

LECTURE III.

in the land beyond the purpose to which it is devoted shall belong to the devisees in a fiduciary character, or for their own benefit.[1]

Where the whole legal interest of a grantor is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted results to the grantor or to his heir or legal personal representatives. But where the whole legal interest is given for a particular purpose, with an intention to give to the grantee of the legal estate the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the grantee, and there is no resulting trust. Thus, a devise to *A* and his heirs charged with the testator's debts is a beneficial devise, subject to a particular purpose, and there will be no resulting trust; but if the devise is upon trust to pay debts, that being a devise for a particular purpose only, a trust will result for the heir.[2]

In *Lallubhai Bapubhai* v. *Mankuvarbai*,[3] Westropp, C.J., said: "Where there is a devise upon trusts which do not exhaust the property devised, the mere conferring of a legacy, or other benefit, upon the heir does not prevent there being a resulting trust of the residue for him, unless there be other circumstances sufficiently strong to turn the scale in favour of the devisee. On the same principle the mere gift, by a testator, of an annuity to his wife has been held not to be sufficient without other circumstances demonstrative of his intention that she should not have both it and dower, to induce the Courts in England to put her to her election between the annuity and dower. Even where there is an expressed intention to exclude the next-of-kin from the residue of personalty, or the heir from the residue of realty, there must be a distinct devise away from them, otherwise there will be a resulting trust in their favour."

Excluding heirs.

In order to exclude the heir, the intention of the grantor to exclude them must be apparent; mere conjecture[4] or the fact that legacies have been given[5] will not be

[1] 1 Jarm., 529, 3rd Ed.

[2] King *v.* Denison, 1 V. and B., 272, *per* Lord Eldon; and see Wood *v.* Cox, 2 M. and C., 684; Rogers *v.* Rogers, 3 P. Wms., 193.

[3] I. L. R., 2 Bom., 410.

[4] Halliday *v.* Hudson, 3 Ves., 211; Phillips *v.* Phillips, 1 M. and K., 661.

[5] Salter *v.* Cavanagh, 1 Dr. and Wal., 668.

sufficient.[1] The trust results, not on the ground of intention, but because the ancestor has declared no intention.[2]

Even where there is an expressed intention to exclude the next-of-kin or heir, there must be a distinct devise away from them, otherwise there will be a resulting trust in their favour.[3]

Parol evidence to rebut presumption.

Parol evidence is admissible to rebut the presumption of law in the case of an instrument made *inter vivos*, and to show the settlor's intention to give the surplus interest beneficially.[4]

Illegal purpose.

If property is assigned for an illegal purpose which is not carried into effect, and nothing is done under it, the mere intention to effect an illegal object when the assignment was executed, does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it.[5]

Trust to sell.

Where estates are devised to executors upon trust, to sell and to invest part of the proceeds of the sale for a particular purpose, but no trust is declared of the sum so reserved after the purpose is satisfied, there will be a resulting trust for the heir.[6]

Under a devise of all the residue of the testator's estate and effects whatsoever, and wheresoever, of what nature or kind soever, to trustees upon trusts applicable only to personal property, the real estate will pass with a resulting trust for the heir.[7] But if the trusts may be applicable to real estate, then the real estate will pass.[8]

If the trusts declared are so vague that they cannot be

[1] King *v.* Denison, 1 V. and B., 274; Amphlett *v.* Parke, 2 R. and M., 230.

[2] Tregonwell *v.* Sydenham, 3 Dow., 211; Lloyd *v.* Spillett, 2 Atk., 151; Habergham *v.* Vincent, 2 Ves. J., 225.

[3] Fitch *v.* Weber, 6 Hare, 145; Johnson *v.* Johnson, 4 Beav., 318; Lallubhai Bapubhai *v.* Mankuvarbai, I. L. R., 2 Bom., 410.

[4] Fowkes *v.* Pascoe, L. R., 10 Ch., 343. As to admission of parol evidence in case of wills, see Lewin, 7th Ed., 56, 134.

[5] Symes *v.* Hughes, L. R., 9 Eq., 475; Manning *v.* Gill, L. R., 13 Eq., 485; Haigh *v.* Kaye, L. R., 7 Ch., 469; Dawson *v.* Small, L. R., 18 Eq., 114.

[6] Stonehouse *v.* Evelyn, 3 P. Wms., 252; Watson *v.* Hayes, 5 M. and C., 125; Page *v.* Leapingwell, 18 Ves., 463; Mariott *v.* Turner, 20 Beav., 557.

[7] Dunnage *v.* White, 1 Jac. and W., 583; Lloyd *v.* Lloyd, L. R., 7 Eq., 458; Longley *v.* Longley, L. R., 13 Eq., 133.

[8] D'Almaine *v.* Moseley, 1 Drew., 629; Coard *v.* Holderness, 20 Beav., 147.

LECTURE III.

executed,[1] or if they lapse,[2] or are void because of unlawfulness,[3] or if property is devised on trusts to be thereafter declared, and no declaration is made,[4] a trust will result.

Trusts vague.

No trust declared.

So also a trust will result when the instrument creating the trust shows that it was not intended that the grantee should take beneficially, as where the conveyance, devise, or bequest is to *A* "upon trust," and no trust is declared.[5]

Trust declared of part only of estate.

If a trust is declared of a part only of an estate, whether by conveyance, *inter vivos*, or by will, the undisposed of interest results to the grantee or testator, or his heirs or representatives.[6] According to English law, the undisposed of residue, in the case of personalty, vests in the executors beneficially. But that rule does not apply to Hindus.[7]

Transfer of stock or money into name of another.

A trust will result where stock or money is transferred to another, unless it can be inferred from the surrounding circumstances that a gift was intended;[8] and where the transfer is into the joint names of the grantor and grantee, the grantee will have a beneficial interest for life.[9]

Purchase in name of trustees.

No trust will result where a person invests money in the names of the trustees of his marriage settlement, the presumption being in such cases that he intended to benefit the persons interested under the settlement.[10]

Though *cestuis que trustent* may claim the whole of an estate which is wholly purchased out of trust monies, they can, if the estate be only partially purchased with trust money, claim only a charge for the amount of the trust monies employed in the trust.[11]

[1] Stubbs *v.* Sargon, 2 Keen., 255; 3 M. and C., 507; Williams *v.* Kershaw, 5 C. and F., 111.

[2] Ackroyd *v.* Smithson, 1 Bro. C. C., 503; Williams *v.* Coade, 10 Ves., 500.

[3] Gibbs *v.* Rumsey, 2 V. and B., 234; Page *v.* Leapingwell, 18 Ves., 463; Tregonwell *v.* Sydenham, 3 Dow., 194.

[4] Fitch *v.* Weber, 6 Hare, 145; Barrs *v.* Fewkes, 2 H. and M., 60; Biddulph *v.* Williams, L. R., 1 C. D., 203.

[5] Dawson *v.* Clarke, 18 Ves., 254; Penfold *v.* Bouch, 4 Hare, 271; Attorney-General *v.* Dean and Canons of Windsor, 24 Beav., 679; 8 H. L. C., 369; Aston *v.* Wood, L. R., 6 Eq, 419; Barrs *v.* Fewkes, 2 H. & M., 60.

[6] Northen *v.* Carnegie, 4 Drew., 587; Nash *v.* Smith, 17 Ves, 29; Mapp *v.* Elcock, 2 Phill., 793; 3 H. L. C., 492; Bird *v.* Harris, L. R., 9 Eq., 204; Williams *v.* Arkle, L. R., 7 H. L., 606.

[7] Lallubhai Bapubhai *v.* Mankuvarbai, I. L. R., 2 Bom., 406.

[8] Custance *v.* Cunningham, 13 Beav., 363; Fowkes *v.* Pascoe, L. R., 10 Ch., 340; Batstone *v.* Salter, L R., 10 Ch., 431.

[9] Fowkes *v.* Pascoe, L. R., 10 Ch., 343.

[10] *Re* Curteis's Trust, L. R, 14 Eq., 217.

[11] Lane *v.* Dighton, Amb., 409; Ryal *v.* Ryal, Amb., 411; Nogender Chunder Ghose *v.* Greender Chunder Ghose, Boul., 389.

Purchase in name of stranger.

Where property is bought by one person in the name of a stranger, to whom the conveyance is made, there will be a resulting trust for the person who paid the purchase-money. "The clear result of all the cases," said Eyre, C. B.,[1] "without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers or others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or *successivé*, results to the man who advanced the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor."[2]

The person who advances the money must do so in the character of purchaser.[3]

Expression of wish.

No resulting trust will be created by the mere expression of a wish on the part of the grantor, that the purchase-money may be applied in a certain way.[4]

Delay.

The rights of a purchaser may be barred by negligence or delay.[5]

Rule applies to joint purchase.

The rule that a trust results for the person who pays the purchase-money applies to the case of a joint purchase in the name of one. In *Crop* v. *Norton*,[6] Lord Hardwicke seemed to think that the application of the rule was confined to an advance by one individual. In *Wray* v. *Steele*,[7] however, Sir T. Plumer decided that a resulting trust arose upon a joint advance, the purchase being taken in the name of one. "Lord Hardwicke," said his Honour, "could not have used the language attributed to him. What is there applicable to an advance by a single individual, that

[1] Dyer *v.* Dyer, 2 Cox, 93.

[2] As to conveyances taken jointly, see *ex parte* Houghton, 17 Ves., 253; Rider *v.* Kidder, 10 Ves., 367. And as to several *successivé*, see Howe *v.* Howe, 1 Vern., 415; Withers *v.* Withers, Amb., 151; Smith *v.* Baker, 1 Atk., 386; Prankard *v.* Prankard, 1 S. and S., 1.

[3] Bartlett *v.* Pickersgill, 1 Eden, 516; Crop *v.* Norton, 9 Mod., 235; Aveling *v.* Knipe, 19 Ves., 441.

[4] Wheeler *v.* Smith, 1 Giff., 300.

[5] Delane *v.* Delane, 7 Bro. P. C., 279; Groves *v.* Groves, 3 Y. and J., 172; Clegg *v.* Edmonson, 8 D. M. G., 787; Peddamuthulaty *v.* Timma Reddy, 2 Mad. H. C., 270.

[6] 2 Atk., 74; 9 Mod., 233; Barn., 184.

[7] 2 V. and B., 388.

LECTURE III.

is not equally applicable to a joint advance under similar circumstances ?"[1]

To personal as well as real estate.

The foregoing doctrines apply as well to personal as to real estate,[2] even though when the property consists of shares in a company, the rules of the company provide that there shall be no benefit of survivorship.[3]

Purchase in fictitious name.

Where money has been invested in the purchase of stock in a fictitious name, for the purpose of defrauding creditors, the Court will order the fictitious name to be erased and the stock to be transferred to the person who paid the purchase-money.[4] Where an intestate had executed transfers of railway shares and stock to a fictitious person, the Court, in a suit by his administrator, declared that the intestate used the fictitious name as another designation of himself, and that the plaintiff, as administrator, was entitled to a transfer of the shares and stock in question, and to receive the dividends thereof.[5]

Parol evidence admissible on part of person paying purchase-money.

Parol evidence is admissible on behalf of the person paying the purchase-money to show that it belonged to him. In *Sir John Pechy's Case*,[6] Sir E. Clarke, M. R., laid it down, that if *A* sold an estate to *C*, and the consideration was expressed to be paid by *B*, and the conveyance made to *B*, the Court would allow parol evidence to prove that the money was paid by *C*.[7] But such parol proofs must be very clear.[8]

Parol evidence on behalf of person to whom conveyance made.

Parol evidence is admissible on behalf of the person to whom the conveyance is made, to rebut the presumption of a resulting trust for the person paying the purchase-money. In *Beecher* v. *Major*,[9] *A* purchased and transferred £1,000 stock in the name of her niece, and wrote her a letter, saying that she had done so, and that she

[1] As to contribution, see Lewin, 7th Edn., 150.

[2] Ebrand *v.* Dancer, 2 Ch. Ca., 26 ; Lloyd *v.* Read, 1 P. Wms., 607 ; Mortimer *v.* Davies, 10 Ves., 363 ; Rider *v.* Kidder, 10 Ves., 360 ; Sidmouth *v.* Sidmouth, 2 Beav., 447 ; Soar *v.* Foster, 4 K. and J., 152 ; Beecher *v.* Major, 2 Dr. and Sm., 431 ; Batstone *v.* Salter, L. R., 19 Eq, 250 ; affd. L. R., 10 Ch., 431.

[3] Garrick *v.* Taylor, 29 Beav., 79 ; affd. 4 DeG. F. and J., 159.

[4] Green *v.* Bank of England, 3 Y. and C. Exch, 722.

[5] Arthur *v.* Midland Railway Company, 3 K. and J., 204.

[6] Rolls, E. T., 1759 M ; 6 Sugd V. and P.

[7] See also Ryal *v.* Ryal, 1 Atk., 59 ; Amb, 413 ; Willis *v.* Willis, 2 Atk, 71 ; Bartlett *v.* Pickersgill, 1 Eden, 516 ; Lane *v.* Dighton, Amb., 409 ; Groves *v.* Groves, 3 Y. and J., 163.

[8] Gascoigne *v.* Thwing, 1 Ver., 366 ; Willis *v.* Willis, 2 Atk., 71.

[9] 2 Dr. and Sm., 431.

intended it for the niece's benefit; and in the letter *A* inclosed a bank-power, which she stated was to enable her to receive the dividends for her life, which power she requested the niece to execute and return to her, and also to destroy the letter, both of which the niece accordingly did. It afterwards turned out that the bank-power authorized *A* to sell out stock as well as receive the dividends. It appeared that *A* had always been very kind to the niece, and by her will, made before the transfer, had given her an annuity of £30. It was held, that parol evidence of the contents of the letter was admissible to rebut the presumption that the stock still belonged to *A*.[1] Parol evidence is admissible for the purpose of rebutting the presumption of a resulting trust as to a part, as well as to the whole of the property.[2]

To rebut presumption as to part of the property.

In a suit between persons governed by English law in the Presidency-towns, I apprehend that parol evidence would not be admissible to show that, where land has been paid for by one person, the purchase was made on behalf of another, for the seventh section of the Statute of Frauds requiring declarations of trust to be in writing is still in force there. This was decided in *Bartlett* v. *Pickersgill*,[3] where Lord Keeper Henley said: "I think the allowing this evidence would be to overturn the Statute. The Statute says there shall be no trust of land unless by memorandum in writing, except such trusts as arise by operation of law. Where money is actually paid, there the trust arises from the payment of the money, not from any agreement of the parties. But this is not like the case of money paid by one man and the conveyance taken in the name of another; in that case the bill charges that the estate was bought with the plaintiff's money. If the defendant says he borrowed it of the plaintiff, then the proof will be whether the money was lent or not; if it was not lent, the plaintiff bought the land; but as here the trust depends on the agreement if I establish the one by parol, I establish the other also. . . . . If the plaintiff had paid any part of the purchase-money, it would have been a reason for me to admit the evidence, or if there had been any fraud used by the

Statute of Frauds.

[1] See also Groves *v.* Groves, 3 Y and J., 163.

[2] Bellasis *v.* Compton, 2 Vern., 294; Benbow *v.* Townsend, 1 M. and K., 506; Deacon *v.* Colquhoun, 2 Drew., 21; Garrick *v.* Taylor, 29 Beav., 79; affd., 4 DeG. F. and J., 163.

[3] 1 Eden, 516. See also Crop *v.* Norton, 9 Mod., 235; 2 Atk., 74; Barn., 179; Chadwick *v.* Maden, 9 Hare, 188.

LECTURE III.

defendant to prevent an execution of the agreement; but as it is, I think that it is a case within the Statute, and that the bill must be dismissed with costs."[1]

Conveyance to stranger without consideration.

In some cases it has been held, that where a conveyance is made to a stranger without any valuable consideration being expressed, that a resulting trust arises for the grantor.[2] In *Young* v. *Peachy*,[3] Lord Hardwicke said: "If a trust by implication was to arise in the present case, it would be to contradict the Statute of Frauds; for it might be said in every case where a voluntary conveyance is made, that a trust shall arise by implication; but that is by no means the rule of the Court.[4] Trusts by implication, or operation of law, arise in such cases, where one person pays the purchase-money, and the conveyance is taken in the name of another, or in some other cases of that kind; but the rule is by no means so large as to extend to every voluntary conveyance."[5]

Where a son conveyed an estate to his father nominally as purchaser, but really as a trustee, and in order that the father, who was in better credit than the son, might raise money on it by way of mortgage for the use of the son, and the father died shortly afterwards, and before any money was raised, having by a will subsequent to the conveyance made a general devise of all his real estates, it was held, that the case was within the Statute, and that parol evidence was not admissible to prove the trust; but that the son had a lien on the estate as vendor for the apparent consideration, no part of which was paid.[6]

Purchases in the name of a wife or child no resulting trust.

No resulting trust arises upon a purchase in the name of a wife alone.[7] Nor upon a joint purchase in the names of husband and wife,[8] nor upon a purchase in the name of a child.[9]

[1] See also Heard *v.* Pilley, L. R., 4 Ch., 548.

[2] Duke of Norfolk *v.* Brown, Prec. Ch., 80; Warman *v.* Seaman, Freem., 308; Sculthorp *v.* Burgess, 1 Ves. J., 93; Davies *v.* Otty (No. 2), 35 Beav., 208.

[3] 2 Atk., 256. [4] See Fordyce *v.* Willis, 3 Bro. C. C, 577.

[5] And see 1 Sand. Uses, 5th Ed., 365; Wms. R. P., 10th Ed., 159; Lloyd *v.* Spillett, 2 Atk., 150.

[6] Leman *v.* Whitley, 4 Russ., 423. This case was doubted by Lord St. Leonards, Sug. V. and P., 14th Ed., 702.

[7] Kingdom *v.* Bridges, 2 Vern., 67; Back *v.* Andrews, 2 Vern., 120; Christ's Hospital *v.* Budgin, 2 Vern., 683; Rider *v.* Kidder, 10 Ves., 360; Gosling *v.* Gosling, 3 Drew., 335; Lloyd *v.* Pughe, L. R., 8 Ch., 88.

[8] Drew *v.* Martin, 2 H. and M., 130.

[9] Dyer *v.* Dyer, 2 Cox, 92; Finch *v.* Finch, 15 Ves., 50; Murless *v.* Franklin, 1 Swanst., 13; Grey *v.* Grey, 2 Swanst., 597; Finch, 340.

If a mortgage is made in the joint names of a husband and wife, this will be considered as being in the nature of a joint purchase, and the wife will, if the husband dies, be entitled to the mortgage money by survivorship.[1]

Reputed wife.

A purchase in the name of the purchaser and of a woman with whom he has gone through the ceremony of marriage, but who could never become his lawful wife, does not come within the rule, and therefore such a purchase will not raise a presumption that it was intended as an advancement or provision for her.[2]

Person *in loco parentis.*

The presumption of advancement may arise in the case of a purchase by a person who has placed himself *in loco parentis* to the person in whose name the purchase is made. Thus the presumption has been held to apply in the case of an illegitimate son.[3]

But the presumption of advancement will not arise in the case of a purchase in the name of an illegitimate grandchild, although the grandfather has placed himself *in loco parentis* to the child.[4]

Purchase by a mother.

In the case of *Re De Visme*,[5] it was said that a mother does not stand in such a relationship to a child as to raise a presumption of benefit for the child. In *Sayre* v. *Hughes*,[6] a mother, after making her will in favour of her two daughters, transferred stock, which had stood in her own name, into the names of herself and one of the daughters, and died. It was held, that there was a presumption of intended benefit to the daughter which was unrebutted, and that the stock belonged absolutely to her. *Re De Visme*[7] was cited as an authority for the proposition, that there could be no presumption of advancement as between a mother and child; but Stuart, V. C., pointed out that the word 'father' does not occur in Lord Chief Baron Eyre's judgment in *Dyer* v. *Dyer*,[8] and said that it was not easy to understand why a mother should be presumed to be less disposed to

[1] Christ's Hospital *v* Budgin, 2 Vern., 683.
[2] Soar *v.* Foster, 4 K. and J., 152.
[3] Beckford *v.* Beckford, Lofft., 490; Kilpin *v.* Kilpin, 1 M. and K., 520; Soar *v.* Foster, 4 K. and J., 152; Tucker *v.* Burrow, 2 H. and M., 515.
[4] Tucker *v.* Burrow, 2 H. and M., 515; Forrest *v.* Forrest, 11 Jur., N. S., 317. See, however, Powys *v* Mansfield, 3 My. and Cr., 359, as to double portions.
[5] 2 DeG. J. and S., 17.
[6] L. R., 5 Eq., 377; see also Hepworth *v.* Hepworth, L. R., 11 Eq., 10.
[7] 2 DeG. J. and S., 17.
[8] 2 Cox, 92.

LECTURE III.

benefit her child in a transaction of this kind than a father. Where stock was transferred by a mother into the names of herself, her daughter, and the daughter's husband, and the dividends on the stock were received by the son-in-law and paid over to the transferror during her life, and the mother died leaving the son-in-law only surviving, it was held, that there was no resulting trust, and that the son-in-law was entitled to the stock, the Court being of opinion that the evidence showed that the mother intended to create a beneficial interest in each of the three persons into whose name the stock was transferred.[1]

Purchase in name of nephew.

Where one of two brothers purchased an estate in the name of his nephew, and paid the whole of the purchase-money, and enjoyed the rents and profits, it was held, in a suit by the purchaser to recover possession, that he must be presumed to have purchased on his own account.[2]

Fiduciary relationship.

Where a fiduciary relationship, such as that of solicitor and client, subsists between a parent and child, and the parent's money is advanced by the child in her own name, the ordinary presumption in favour of the transaction being a gift, is excluded, and the *onus* is thrown upon the child of proving that a gift was in fact intended.[3]

Purchases void as against creditors.

Purchases in the name of a wife or child by way of gift, or advancement, are, it appears, within the 13 Eliz., c. 5, and may be avoided as against creditors.[4]

Rules apply to personal estate.

The rules of English Courts of Equity as to resulting trusts apply also to personal estate, and therefore, where a husband transfers stock into the names of himself and his wife, no resulting trust will arise for the husband, but the wife will be entitled to the whole of the fund by survivorship;[5] so also in the case of a transfer of stock into the names of a parent and child, the stock will belong to the child surviving.[6]

[1] Batstone *v.* Salter, L. R., 19 Eq., 250; affd., L. R., 10 Ch., 431. And see Fowkes *v.* Pascoe, L. R., 10 Ch., 343.

[2] Sheeoram Ghose *v.* Dataram Ghose, 2 Sel., 53.

[3] Garrett *v.* Wilkinson, 2 DeG. and Sm., 244; see also Hepworth *v.* Hepworth, L. R., 11 Eq., 14.

[4] Glaister *v.* Hewer, 8 Ves., 195; Townsend *v.* Westacott, 2 Beav., 340; 4 Beav., 58; Christy *v.* Courtenay, 13 Beav., 96; Barrack *v.* M'Culloch, 3 K. and J., 110; Drew *v.* Martin, 2 H. and M., 130.

[5] Dummer *v.* Pitcher, 2 M. and K., 262; Low *v.* Carter, 1 Beav., 426; Vance *v.* Vance, *ib.*, 605; Poole *v.* Odling, 31 L. J., Ch., 439.

[6] Sayre *v.* Hughes, L. R., 5 Eq., 376; *Re* De Visme, 2 DeG. J. and S., 17.

Surrounding circumstances to be considered.

The mere circumstance that the name of a wife or child is inserted on the occasion of a purchase of stock is not sufficient to rebut the presumption of a resulting trust in favour of the purchaser, if the surrounding circumstances lead to the conclusion that a trust was intended. Although a purchase in the name of a wife or a child, if altogether unexplained, will be deemed a gift, yet the surrounding circumstances may be taken into consideration so as to say that it is a trust, and not a gift. Thus in *Marshall* v. *Crutwell*,[1] the husband of the plaintiff, being in failing health, transferred his banking account from his own name into the joint names of himself and his wife, and directed the bankers to honour cheques drawn either by himself or his wife, and he afterwards paid in considerable sums to their account. All cheques were afterwards drawn by the plaintiff at the direction of her husband, and the proceeds were applied in payment of household and other expenses. The husband never explained to the plaintiff what his intention was in transferring the account, but he was stated by the bank manager to have remarked at the time of the transfer that the balance of the account would belong to the survivor of himself and his wife. After the death of her husband (which took place a few months after the transfer), the plaintiff claimed to be entitled to the balance. It was held, that the transfer of the account was not intended to be a provision for the plaintiff, but merely a convenient mode of managing her husband's affairs, and consequently that she was not entitled. Jessel, M. R., said: "In all the cases in which a gift to the wife has been held to have been intended, the husband has retained the dominion over the fund in this sense, that the wife during the lifetime of the husband has had no power independently of him, and the husband has retained the power of revoking the gift. In transferring a sum of stock, there is no obvious motive why a man should put a sum of stock into the name of himself and his wife. She cannot receive the dividends, he can and must, and it is difficult to see any motive of convenience or otherwise which should induce a man to buy a sum of stock or transfer a sum of stock (if there is any difference between the two) in or into the names of himself and his wife, except the motive of benefiting

[1] L. R., 20 Eq., 329; and see Fowkes v. Pascoe, L. R., 10 Ch., 343.

LECTURE III.

her in case she survives. But here we have the actual fact, that the man was in such a state of health that he could not draw cheques, and the wife drew them. Looking at the fact that subsequent sums are paid in from time to time, and taking into view all the circumstances (as I understand I am bound to do) as a juryman, I think that the circumstances show that this was a mere arrangement for convenience, and that it was not intended to be a provision for the wife in the event which might happen, that at the husband's death there might be a fund standing to the credit of the banking account."

Purchase-money unpaid.

Where a purchase, either of moveable or immoveable property, is made in the name of a wife or child, and the purchaser dies before the whole of the purchase-money is paid, the purchase will enure for the benefit of the wife or child, and the unpaid purchase-money is payable out of the purchaser's personal estate.[1]

Joint tenancy when created.

A purchase in the joint names of a father and son creates a joint tenancy.[2] In one case, where the father had no other estate to which a judgment-creditor could resort, the creditor was relieved in equity against the survivorship at law.[3]

Purchase in the name of a child and a stranger.

If a purchase is made by a parent in the name of a child and of a stranger, whether of real or personal estate, it will be considered as an advancement; the stranger will be treated as a trustee for the child, and there will not be any resulting trust to the father.[4]

Evidence to rebut presumption of advancement.

In certain cases where a purchase is made in the name of a child, the presumption of advancement may be rebutted.[5] The antecedent and contemporaneous acts and declarations of the parent are admissible in evidence to rebut the presumption of advancement, but his subsequent acts and declarations are inadmissible for that purpose.[6]

[1] Redington *v.* Redington, 3 Ridg., P. C., 177; Vance *v.* Vance, 1 Beav., 605; Drew *v.* Martin, 2 H. and M., 130; Skidmore v. Bradford, L. R., 8 Eq., 134.

[2] Scroope *v.* Scroope, Freem., 171; 1 Ch. Cas., 27; Back *v.* Andrew 2 Vern., 120; Grey *v.* Grey, 2 Swanst., 599; Dummer *v.* Pitcher, 2 M. and K., 272.

[3] Stileman *v.* Ashdown, 2 Atk., 477; see Pole *v.* Pole, 1 Ves., 76.

[4] Lamplugh *v.* Lamplugh, 1 P. Wms., 111; Mumma *v.* Mumma, 2 Vern., 19; Finch *v.* Finch, 15 Ves., 43; Crabb *v.* Crabb, 1 M. and K., 511; Collinson *v.* Collinson, 3 D. M. G., 403.

[5] Keats *v.* Hewer, 10 Jur., N. S., 1040.

[6] Redington *v.* Redington, 3 Ridg., 177; Lloyd *v.* Read, 1 P. Wms., 607; Murless *v.* Frankin, 1 Swanst., 13; Sidmouth *v.* Sidmouth, 2 Beav., 447; Collinson *v.* Collinson, 3 D. M. G., 409; Dumper *v.* Dumper, 3 Giff., 583; Williams *v.* Williams, 32 Beav., 370; Tucker *v.* Burrow, 2 H. and M., 515.

In *Devoy* v. *Devoy*,[1] the presumption that the transfer by a father of stock into the joint names of himself, his wife, and child, was intended to be an advancement, was allowed to be rebutted by the evidence of the transferror that no trust was intended, but that the transfer was made under a misapprehension of its legal effect.[2]

Subsequent acts and declarations.

Although subsequent acts and declarations of the parent are not evidence to the support of the trust, subsequent acts and declarations of the child may be so.[3]

Possession by father.

The presumption of advancement will not be rebutted by the fact of the father having continued in possession of the estate during his life,[4] nor by the fact that he has expended money in repairs on the estate.[5]

Dividends received by father.

Where a father purchases stock or shares in the name of a child, and receives the dividends during his life under a power from the son, this alone will not rebut the presumption of advancement.[6] In *Smith* v. *Warde*,[7] a father directed stock to be purchased in the names of himself and his wife in trust for his infant son. The purchase was made in the joint names without any trust being declared, and the father received the dividends down to his decease. It was held, that neither his son nor his wife (who survived him) were entitled to the stock, but that it formed part of his assets.[8]

Devise, bequest, or lease.

If, after a purchase of property by a parent or by a husband in the name of a child or wife, the purchaser devises or bequeaths it,[9] or leases it,[10] the *primâ facie* presumption of advancement will not be rebutted.

Where a testator by his will settled £1,000, reduced annuities, on each of his grand-daughters, the children of his only son, and two years afterwards he transferred a

[1] 3 Sm. and G., 403.
[2] See also Stone *v.* Stone, 3 Jur. (N. S.), 708.
[3] Sidmouth *v.* Sidmouth, 2 Beav., 447.
[4] Grey *v.* Grey, 2 Swanst., 600; Lamplugh *v.* Lamplugh, 1 P. Wms., 111; Taylor *v.* Taylor, 1 Atk., 386; Christy *v.* Courtenay, 13 Beav., 96.
[5] Shales *v.* Shales, 2 Freem., 252; Elliot *v.* Elliot, 2 Ch. Cas., 231; Scawin *v.* Scawin, 1 Y. and C. C. C., 65.
[6] Sidmouth *v.* Sidmouth, 2 Beav., 447; Scawin *v.* Scawin, 1 Y. & C. C. C., 65.
[7] 15 Sim., 56.
[8] See also Hoyes *v.* Kindersley, 2 Sm. and G., 195; Bone *v.* Pollard, 24 Beav., 283.
[9] Crabb *v.* Crabb, 1 M. and K., 511; Dummer *v.* Pitcher, 2 M. and K., 262; Jeans *v.* Cooke, 24 Beav., 513.
[10] Murless *v.* Franklin, 1 Swanst., 13.

LECTURE III.

sum of £3,200, reduced annuities, which was all the property he possessed, into the name of his son, and died at the age of ninety-four, having resided the last ten years of his life with his son, who was a man of considerable property, it was held that the transfer to the son operated as an absolute gift to him free from any trusts.[1]

Child fully advanced.

If a purchase is made in the name of a child who is already fully advanced by the parent, there will be a resulting trust for the father;[2] but if the child be not at all, or only in part, advanced, the presumption of advancement will not be turned into a trust.[3]

Where lands are purchased in a certain place in the name of a child by a father, but it appears that the father is bound to settle lands so purchased in a particular manner, there will not be any advancement, but the child will be a trustee merely.[4]

[1] Hepworth *v.* Hepworth, L. R., 11 Eq., 10.
[2] Lloyd *v.* Read, 1 P. Wms., 608; Pole *v.* Pole, 1 Ves. S., 76.
[3] Grey *v.* Grey. 2 Swanst., 600; Elliot *v.* Elliot, 2 Ch. Cas., 231.
[4] Blake *v.* Blake, 7 Bro. P. C., 241.

LECTURE IV.

BENAMI TRANSACTIONS AND CONSTRUCTIVE TRUSTS.

Benami transactions — Purchase in name of child — Burden of proof — Strangers — Benami transactions among Mahomedans — Assent of benamidar unnecessary — Disputing landlord's title — Suit by landlord against beneficial lessees — Strict proof required — Oral evidence — Proof of payment of purchase-money — Pleading benami transaction against purchaser under s. 317, Civil Procedure Code — Purchase at sale for arrears of revenue — Sale by benamidar — Standing by — Purchaser with notice — Real owner may sue benamidar — Equitable owner — Suit by creditors against benamidar — Transaction avowedly fraudulent — Constructive trusts — Renewal of leases by trustee — Principle of rule — Instances — Remedy — Agent of trustee — Legal adviser gaining advantage by ignorance — Gifts to persons in fiduciary capacity — Voluntary gift where no fiduciary relation when set aside — Onus of proof where fiduciary relation exists — Where it does not — Spiritual influence — Parent and child — Persons *in loco parentis* — Guardian and ward — Gift to legal adviser — Extent of rule — Gift in expectation of death — Strangers — Principles on which Court acts — Badges of fraud — Independent advice — At whose instance set aside — Aquiescence — Confirmation and acquiescence — Laches.

Benami transactions.

It will be convenient in this place to consider what is known as a *benami* transaction,—that is to say, the practice of putting property into a false name. However objectionable the system may be, it is legal and in common use.[1]

"The Law of Benami," says Mr. Mayne,[2] "is in no sense a branch of Hindu law. It is merely a deduction from the well-known principle of equity, that where there is a purchase by *A* in the name of *B*, there is a resulting trust of the whole to *A*; and where there is a voluntary conveyance by *A* to *B*, and no trust is declared, or only a trust as to part, that there is a similar trust in favour of the grantor as to the whole or as to the residue, unless it can be made out that an actual gift was intended.

Purchase in name of child.

"In the English Courts an exception is made to this rule, where the person in whose name the conveyance is taken or made is a child of the real owner, when the transaction

[1] M. S. Beebee Nyamut *v.* Fuzl Hossein, S. D. A. of 1859, p. 139.
[2] Hindu Law, s. 367.

LECTURE IV.

is presumed to have been made by way of advancement to him. But this exception has not been admitted in India. There the rule is well established that in all cases of asserted benami the true criterion is to ascertain from whose funds the purchase-money proceeded. Whether the nominal owner be a child or a stranger, a purchase made with the money of another is *primâ facie* assumed to be made for the benefit of that other,"[1] whether a daughter or a son.

"The wives and mothers of the members of a joint undivided Hindu family, so long as they continue to live in the family, and are supported out of its income, are just as much members of that family as their husbands and sons; and as unity of possession is one of the essential characteristics of a joint undivided Hindu family, no difference in the nature of the interests possessed by the different members thereof can affect the presumption with which we have to deal in this case. So far as the ordinary and usual course of things is concerned, the practice of making benami purchases in the names of female members of joint undivided Hindu families is just as much rife in this country as that of making such purchases in the names of male members and . . . .the presumption against such acquisition is no less strong in the former case than in the latter."[2]

Burden of proof.

The burden of proof lies on the party in whose name the property was purchased, to prove that he was solely entitled to the legal and beneficial interest in such purchased estate.[3] But although the habit of holding land benami is inveterate in India, that does not justify the Courts in making every presumption against apparent ownership.[4]

Strangers.

If the person in whose name the purchase is effected, is a stranger in blood or only a distant relative, he will be undoubtedly *primâ facie* a trustee; and if he desires

[1] Dhurm Das Pandey *v.* M. S. Shama Soondri Dibiah, 3 Moo. I. A., 229, 240; Gopeekrist Gosain *v.* Gungapersaud Gosain, 6 Moo I. A., 53, 74; Moulvie Syud *v.* M. S. Bibee, 13 Moo. I. A., 232; Ruknadawla Nowab Ahmed Ali Khan v. Hurdwari Mull, 5 B. L. R., 578.

[2] Chunder Nath Moitro *v.* Kristo Komul Singh, 15 W. R., 357, *per* Dwarkanath Mitter, J. See, however, Obhoy Churn Mookerjee *v.* Punchanun Bose, Marsh., 564.

[3] Gopeekrist Gosain *v.* Gungapersaud Gosain, 6 Moo. I. A., 53.

[4] Moonshee Buzloor Ruheem *v.* Shumsoonnissa Begum, 8 W. R., P. C. Rul., 11.

to contend that the *primâ facie* character of the transaction was not its real character, the burthen is on him. In *Gopeekrist Gosain* v. *Gungapersaud Gosain*,[1] the purchase was made in the name of an only son, and it was argued that this circumstance changed the presumption, and that what would be the presumption in the case of a stranger does not exist between father and son; that the presumption is advancement, and that, therefore, the burden of proof was shifted. But the Judicial Committee held, that there was no authority in Indian law, no distinct case or dictum establishing or recognizing such a principle or such a rule. "It is clear," said Knight Bruce, L. J.,[2] "that in the case of a stranger the presumption is in favour of its being a *benami* transaction, that is a trust; but it is clear also that in this country, where the person in whose name the purchase is made is one for whom the party making the purchase was under an obligation to provide, the case is different; and it is said that that ought to be deemed the law of India also, not because it is the law of England, but because it is founded on reason and the fitness of things, if I may use the expression, or natural justice, that on such grounds it ought to be considered the law of India. Now, their Lordships are not satisfied that this view of the rule is accurate, and that it is not one merely *proprii juris*. Probable as it may be, that a man may wish to provide for his son to a certain extent, and though it may be his duty to do so, yet there are other considerations belonging to the subject; among others, a man may object to making his child independent of him in his lifetime, placing him in such a position as to enable him to leave his father's house and to die, leaving infant heirs, thus putting the property out of the control of the father. Various reasons may be urged against the abstract propriety of the English rule. It is merely one of positive law, and not required by any rule of natural justice to be incorporated in any system of laws, recognizing a purchase by one man in the name of another to be for the benefit of the real purchaser. Their Lordships, therefore, are not prepared to act against the general rule, even in the absence of peculiar circumstances; but in India there is what would make it particularly objectionable, namely, the impropriety or immorality of

[1] 6 Moo. I. A., 53. [2] P. 75.

LECTURE IV.

making an unequal division of property among children. . . . . Their Lordships are, therefore, satisfied that, according to the law by which this case must be governed, the presumption in favour of its being a benami transaction is different from that which would have existed by the law of England."

Benami transactions among Mahomedans.

In so far as the practice of holding and buying lands in the name of another exists, that practice exists in India as much among Mahomedans as among Hindus; and the judgment in *Gopeekrist Gosain* v. *Gungapersaud Gosain*[1] and the cases therein referred to are, at all events, authority for the propositions that the criterion of these cases in India is to consider from what source the purchase-money comes; that the presumption is, that a purchase made with the money of *A*, in the name of *B*, is for the benefit of *A*; and that, from the purchase by a father, whether Mahomedan or Hindu, in the name of his son, you are not at liberty to draw the presumption which the English law would draw, of an advancement in favour of that son.[2] Although a purchase by a Mahomedan with his own money of an estate in the name of his son, raises a presumption of the son's name being used benami for his father, proof that the father's object was to affect the ordinary rule of succession as from him to that property is sufficient to give, as respects strangers, a title to the son independent of, and adverse to, the father.[3]

Assent of benamidar unnecessary.

The knowledge and assent of the person in whose name the purchase is made is immaterial; in the greater number of instances of benami purchases they are made in the names of persons ignorant at the time of their being so made.[4]

Disputing landlord's title.

As a general rule, a tenant cannot dispute his landlord's title.[5] The rule is founded upon the doctrine of estoppel, which is, as Lord Coke says, "a curious and excellent sort of learning." But it has been decided that the doctrine of estoppel does not apply to benami transactions, and that in this country a lessee may deny that the person in whose favour he has executed a lease was the real lessor,

[1] 6 Moo. I. A., 53.

[2] Moulvie Sayyud Uzhur Ali *v.* Mussummat Bebee Ultaf Fatima, 13 Moo. I. A., 232, 246: see 2 Mad. H. C. Rep, 27 (*n*).

[3] Ruknadawla Nowab Ahmed Ali Khan *v.* Hurdwari Mull, 5 B. L. R., 578.

[4] Gopeekrist Gosain *v.* Gungapersaud Gosain, 6 Moo. I. A., 74.

[5] See Evidence Act, I of 1872, s. 116.

and beneficially entitled to the rent, and that he may prove by parol evidence that the person who granted the lease was only a benamidar for a third party. In *Donzelle* v. *Kedarnath Chuckerbutty*,[1] Paul, J., said: "In England, where the usage denoted by benami transactions is wholly unknown, it is supposed, and therefore assumed, that all deeds and conveyances truly represent the titles of parties set forth in them. Deeds are called solemn instruments; they are executed after considerable deliberation, and under the guidance, and with the advice, of able legal advisers. In England, and in fact wherever the English law prevails, and English institutions exist, it is right to suppose that what is stated in deeds and other similar documents represents the true state of things, and consequently, parties should not be allowed afterwards to question the truth of what has been deliberately stated. But in this country, it being well known that documents are neither so drawn nor executed as in England, and it being equally well known that persons make statements wholly regardless of the truth for present and ulterior purposes, it would be unsafe and unjust to hold parties strictly to statements made by them in deeds and other documents, and to apply the technical doctrine of estoppel in the manner in which that doctrine is applied in cases governed by English law."

SECRETARIAT LIBRARY

Suit by landlord against beneficial lessees.

Where a lease was taken benami in the names of three ladies, who for some time paid rent to the lessor, and who were sued for rent by him on several occasions when he obtained decrees, which he executed against their property, the lessor was nevertheless allowed, when the ladies were unable to pay any rent, to sue their husbands, who were the beneficial lessees.[2]

Strict proof required.

The Courts look with jealousy on benami transactions, and a person who claims under such a title must prove his case strictly, and he can only recover on the strength of the case he asserts; mere inferences will not be sufficient to induce the Court to take away property from the person in whose name it is held.[3]

Where *bonâ fide* creditors of the ostensible owner of property are claimants on that property, the Court will

[1] 7 B. L. R., 720.
[2] Debnath Roy Chowdhry *v.* Gudadhur Dey, 18 W. R., 132.
[3] Sreemanchunder Dey *v.* Gopaul Chunder Chuckerbutty, 11 Moo. I. A, 28; Nowab Azimut Ali Khan *v.* Hurdwaree Mull, 13 Moo. I. A., 395.

LECTURE IV.

require strict proof on the part of any one seeking to have it declared that he held it only benami.[1] Though there may be in the evidence circumstances which may excite suspicion, and doubt may be entertained with regard to the truth of the case made, it is essential to take care that the decision of the Court rests, not upon suspicion, but upon legal grounds, established by legal testimony.[2] If it is once established that a transaction is benami, the fact that the deeds and proceedings bear the benamidar's name, is perfectly consistent with the benami case, and is of no essential weight on the one side or the other in considering who is the principal.[3] It is not necessary that the nature of the transaction should be proved by writing, but oral evidence is admissible.[4] The persons who seek to prove that a transaction was benami, must prove the payment of the purchase-money; and if they do so, any subsequent acts done in the name of the nominal owner, will be explained by reference to the original transaction; whereas if they cannot prove that payment, their case must necessarily fail.[5]

Oral evidence.

Proof of payment of purchase-money.

Pleading benami transaction against purchaser under s. 317, Civil Procedure Code.

The real owner of property, who is actually in possession, may plead in answer to a suit for redemption by a certified purchaser under s. 317 of the Civil Procedure Code, that the purchase was made benami by the plaintiff on his behalf. This section corresponds with s. 260 of Act VIII of 1859, and it was decided by the Privy Council that that section should be construed strictly and literally; that it was applicable only to a suit brought against the certified purchaser to assert the benami title against him; that the Statute did not make benami purchases illegal; and that the real owner for whom the purchase was made, if in possession, and if that possession had been honestly obtained, might defend a suit brought by the holder of the certificate, and show that he was the apparent owner only and a mere trustee.[6]

[1] Ruknadawla Nowab Ahmed Ali Khan *v.* Hurdwari Mull, 5 B. L. R, 578.

[2] Sreemanchunder Dey *v.* Gopal Chunder Chuckerbutty, 11 Moo. I. A., 28, 44; Faez Buksh Chowdry *v.* Fukeeroodeen Mahomed Ahassun Chowdry, 14 Moo. I. A., 234.

[3] Rohee Lall *v.* Dindyal Lall, 21 W. R., 257.

[4] Palaniyappa Chetti *v.* Arumugam Chetti, 2 Mad. H. C. R, 26; Tara Monee Debia *v.* Shibnath Tulapatur, 6 W. R., 191.

[5] M. S Beebee Nyamut *v.* Fuzl Hossein, S. D. A. of 1859, p. 139.

[6] M. S. Buhuns Kowur *v.* Lalla Buhoree Lall, 14 Moo. I. A., 496; Lokhee Narain Roy Chowdhry *v.* Kalypuddo Bandopadhya, L. R., 2 I. A., 154.

The provisions of s. 260 of Act VIII of 1859 apply to ordinary benami purchases at execution-sales, but do not affect purchases of property by one member of a Hindu family in his own name, but with the joint funds. Those provisions, say the Privy Council, "were designed to check the practice of making what are known as benami purchases at execution-sales, *i.e.*, transactions in which *A* secretly purchases on his own account in the name of *B*. Their Lordships think that they cannot be taken to affect the rights of members of a joint Hindu family, who by operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as part of their common property an acquisition howsoever made by a member of a family in his sole name, if made by the use of the family funds."[1]

Purchase at sale for arrears of revenue.

A purchase at a sale for arrears of revenue made by a managing member of a joint Hindu family in his own name, is not affected by the 21st section of Act I of 1845, which provides that "any suit brought to oust the certified purchaser as aforesaid on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed with costs;" and notwithstanding anything contained in that section, the members of the joint family may sue to enforce rights acquired by them under such a purchase as against the managing member, though he is the sole certified purchaser.[2]

Sale by benamidar.

If property is purchased in the name of a benamidar, and all the indicia of ownership are placed in his hands, and the benamidar sells to a purchaser for valuable consideration, the true owner can only get rid of the effect of the alienation by showing that it was made without his own acquiescence, and that the purchaser took with notice of that fact. If the purchaser bought in good faith, and without notice, he acquires a good title as against the true owner and his heirs, or any subsequent purchaser from them.[3]

Standing by.

Parties who stand by, and permit another to hold himself out to the world as the real proprietor of an estate

[1] Bodh Singh Doodhooria *v.* Gunesh Chunder Sen, 12 B. L. R., 317, 330.
[2] Toondun Singh *v.* Pokh Narain Singh, 13 W. R., 347.
[3] Bhugwan Doss *v.* Upooch Singh, 10 W. R., 185; Rackhaldoss Moduck *v.* Bindoo Bashinee Debia, Marsh., 293; Kally Doss Mitter *v.* Gobind Chunder Paul, Marsh., 569; Rennie *v.* Gunga Narain Chowdhry, 3 W. R., 10.

LECTURE IV.

when in reality he is not so, and thus induce parties, innocent of the fraud, to lend their money upon such faith, are not entitled to any consideration from a Court of equity and good conscience.[1]

Purchaser with notice.

If a purchaser of an estate at its full value takes with notice of a trust, he is bound to the same extent and in the same manner as the person of whom he purchased, for, knowing another's right to the property, he throws away his money voluntarily and of his own free will.[2] Notice is either actual or constructive. What is sufficient to put a purchaser upon inquiry is good notice,—that is, where a man has sufficient information to lead him to a fact, he shall be deemed cognizant of it. It is sufficient to charge a man with knowledge that he had that before him, which, if he had used due diligence, would have afforded the knowledge he desires.[3] And where there is a person in possession of the estate other than the nominal owner, the person in whose name the title-deed is, the purchaser is bound to enquire what is the nature of his possession. If he does not think fit to do so, he takes subject to the rights of the person in possession.[4]

Real owner may sue benamidar.

The real owner of property may sue the benamidar, either to declare his title to the property, or to recover possession of it, and may prove the benami nature of the transaction.[5] Thus where a portion of a taluq, which was confiscated by Government, really belonged to an innocent person who had allowed her property to remain in the name of the taluqdar, she was allowed to sue the Government and the taluqdar to recover the confiscated property, the Privy Council saying "the decree of confiscation against her trustee could on no principle of law, equity, or good conscience, be made to affect her, and certainly not to justify a sentence which, in effect, made her the sufferer for his offence."[6]

Equitable owner.

The equitable owner of property which is in the name

[1] Nundun Lal *v.* Tayler, 5 W. R., 37; Brojonath Ghose *v.* Koylash Chunder Banerjee, 9 W. R., 593; Nidhee Singh *v.* Bissonath Dass, 24 W. R., 79.

[2] Mancharji Sorabji Chulla *v.* Kongseo, 6 Bom. H. C. R., O. C., 59; Hakeem Meah *v.* Beejoy Patnee, 22 W. R., 8.

[3] Mancharji Sorabji Chulla *v.* Kongseo, 6 Bom. H. C. R., O. C., 59.

[4] Hakeem Meah *v* Beejoy Patnee, 22 W. R., 8.

[5] Tara Soonduree Debee *v.* Oojul Monee Dossee, 14 W. R., 111.

[6] M. S. Thukrain Sookraj Koowar *v.* The Government, 14 Moo. I. A., 112.

of a trustee may prove the benami nature of the transaction in a suit by the trustee to obtain possession of the property.[1]

Suit by creditors against benamidar.

Creditors may enforce their claims against the property of their debtor held for him benami.[2] Thus it has been held, that a conveyance to female members of a Hindu family, the father continuing in absolute and uncontrolled possession during his life, and his son entering into possession after his death, could not exclude the claim of the son's creditors.[3]

Transaction avowedly fraudulent.

In many cases the object of the benami transaction is avowedly to defraud creditors, and against them it is, as we have seen,[4] void.[5] But as between the true owner and the benamidar the question arises, whether the owner can sue for the restitution of the property, alleging that the sale was fraudulent, or can set up the defence of his own fraud in an action by the benamidar. Formerly it was considered that no title could be founded upon fraud, and that if a man chose to convey his property to another admittedly for the purpose of deceiving the public, defrauding his creditors, and avoiding the ends of justice, he disentitled himself to any relief,[6] even though no person had been defrauded.[7] And the Courts refused to recognize any distinction in favour of an ignorant female.[8]

"Courts of Justice," said Jackson, J., "are designed for the protection of honest suitors, and the enforcement of just claims. They are not available as machinery to aid in the carrying out of schemes of fraud. It is right that parties should know, in making secret arrangements in regard to

[1] Ramanugra Narain *v.* Mahasundur Kunwar, 12 B. L. R., 433.

[2] Musadee Mahomed Cazum Sherazee *v.* Meerza Ally Mahomed Shoostry, 6 Moo. I. A., 27.

[3] Hemanginee Dossee *v.* Jogendro Narain Roy, 12 W. R., 236.

[4] *Ante*, p

[5] See also Gnanabhai *v.* Srinivasa, 4 Mad. H. C., 84; Sankarappa *v.* Kamayya, 3 Mad. H. C., 231; Pullen *v.* Ramalinga, 5 Mad. H. C., 368; Tillak Chund *v.* Jitamal, 10 Bom., 206.

[6] Roushun Khatoon Chowdrain *v.* The Collector of Mymensingh. S. D. A. of 1846, p. 120; Brimho Mye Dibeea *v.* Ram Dolub Hor, S. D. A. of 1849, p. 276; Rajah Rajnarain Roy *v.* Juggunnath Pershad Mullick, S. D. A. of 1851, p. 774; Ram Soonder Sandial *v.* Rajah Anundnath Roy, S. D. A. of 1856, p. 542; Koonjee Singh *v.* Jankee Singh, S. D. A. of 1852, p. 838; Keshub Chunder Sein *v.* Vyasmonee Dossia, 7 W. R., 118; S. M. Sukhimani Dasi *v.* Mahendranath Dutt, 4 B. L. R. (P. C.), 16.

[7] Hurry Sunker Mookerjee *v.* Kali Coomar Mookerjee, W. R., 1864, p. 265.

[8] Bhowany Sunkur Pandey *v.* Purem Bebee, S. D. A. of 1853, p. 639.

their property for fraudulent purposes, such as defeating their creditors, that they are entering on a dangerous course, and that they must not expect the assistance of the Courts to extricate themselves from the difficulties in which their own improbity has placed them."[1]

So the Courts refused to allow a defendant to plead, that a deed which was admittedly executed by him, was executed for the purpose of defrauding his creditors, on the ground that, though a deed may be avoided on the ground of fraud, the objection must come from a person neither party nor privy to it, and that no man can allege his own fraud to invalidate his own deed.[2] And the principle was applied equally to persons claiming through the author of the fraud.[3]

But in the later cases these principles have not been followed, and the original owner of property has been allowed to plead that the transaction was fraudulent, the reason being, that the real rights of the parties are to be ascertained, and if the plea were disallowed, the Courts would assist the benamidar to obtain property by means of fraud. Thus, in a suit brought by the plaintiff for registration of her name in the place of a person from whom she said she had purchased the property, one of the defendants contended that the plaintiff's vendors had purchased the property benami for her (the defendant), and that she had been in possession of it from the date of her purchase. It appeared that there had been no consideration for the sale to the plaintiff, and that it had been executed by the defendant's husband for the purpose of defrauding his creditors. In a previous suit the defendant had stated that the plaintiff's vendors were really the purchasers of the property. It was held that she was not estopped by this statement from now showing the real truth of the transaction. "In many of these cases," said Couch, C.J., "the object of a benami transaction is to obtain what may be called a shield against a creditor; but notwithstanding this, the parties are not precluded from showing that it was not intended that the

[1] Aloksoondry Goopto *v.* Horo Lal Roy, 6 W. R., 287.

[2] Obhoy Churn Ghuttuck *v.* Treelochun Chatterjee, S. D. A. of 1859, p. 1639; Ram Lall Dut *v.* Kishen Chunder Banerjee, S. D. A. of 1860, pp. 1, 436.

[3] Luckhee Narain Chuckerbutty *v.* Tara Monee Dossee, 3 W. R., 92; Purikheet Sahoo *v.* Radha Kishen Sahoo, 3 W. R., 221; Kaloo Nath Kur *v.* Doyal Kristo Deb, 13 W. R., 87.

property should pass by the instrument creating the benami, and that in truth it still remained in the person who professed to part with it. . . . . Although, no doubt, it is improper that transactions of this kind should be entered into for the purpose of defeating creditors, yet the real nature of the transaction is what is to be discovered, the real rights of the parties. If the Courts were to hold that persons were concluded under such circumstances, they would be assisting in a fraud, for they would be giving an estate to a person when it was never intended that he should have it."[1]

A suit will lie in which the plaintiff does not sue to render void an act done by him in fraud, or in other terms, to be relieved from the effect of his own fraudulent act, but simply sues to have an act legal in itself enforced, though done with the motive of keeping property out of the reach of his creditors.[2]

Constructive trusts.

The last kind of trust with which we have to deal is that known as a constructive trust. A constructive trust is one which the Court elicits by a construction put upon certain acts of parties. Such a trust is raised wherever a person clothed with a fiduciary character, as for instance, a factor,[3] agent,[4] or partner,[5] gains some personal advantage, by availing himself of his situation as trustee; for, as it is impossible that a trustee should be allowed to make a profit by his office, it follows that so soon as the advantage in question is shown to have been acquired through the medium of a trust, the trustee will be decreed to hold for the benefit of his *cestui que trust*.[6]

Renewal of lease by trustee.

A common instance of a constructive trust is, where a trustee of leasehold property renews the lease in his

[1] S. M. Debia Chowdhrain *v.* Bimola Soonduree Debia, 21 W. R., 422. And see Gopeenath Naik *v.* Jadoo Ghose, 23 W. R., 42; Bykunt Nath Sen *v.* Goboollah Sikdar, 24 W. R., 391; Param Singh *v.* Lalji Mal, I. L. R., 1 All., 403. As to the principles upon which English Courts proceed where an attempt is made to create a trust for a fraudulent purpose, see *ante*, p 48.

[2] Suboodra Beebee *v.* Bikromadit Singh, S. D. A. of 1858, pp. 543, 548.

[3] East India Co. *v.* Henchman, 1 Ves. J., 287.

[4] Fawcett *v.* Whitehouse, 1 R. & M., 132; Hichens *v.* Congreve, *ib.*, 150, *n*; Brookman *v.* Rothschild, 3 Sim., 153; Gillett *v.* Peppercorn, 3 Beav., 78; Edwards *v.* Lewis, 3 Atk., 538; Griffin *v.* Griffin, 1 Sch. and Lef., 352; Mulvany *v.* Dillon, 1 B. and B., 417; Mulhallen *v.* Marum, 3 De and Wal., 317.

[5] Bentley *v.* Craven, 18 Beav., 75; Burton *v.* Wookey, 6 Madd., 367.

[6] Lewin, 7th Ed., 98, 165.

LECTURE IV.

own name. The leading case on this point is *Keech* v. *Sandford*.[1] There the lessor refused to renew the lease for an infant, and the trustee then got a lease made to himself. Lord King, however, declared that the trustee must hold the renewed lease for the infant, though no fraud was alleged, saying: "This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that rule should be strictly pursued, and not in the least relaxed."

An executor *de son tort* cannot renew a lease in his own name.[2] Where the renewed lease comprises lands not included in the former lease, the trust will not attach to such lands.[3]

Principle of rule.

The principle upon which trustees and executors are not allowed to take renewals of leases of trust-property to themselves is, that it is for the public good that persons in fiduciary positions shall not be allowed to reap any benefit from the positions which they hold.[4]

Instances.

If a person who has a limited interest in a lease renews it in his own name, he can only hold it as a trustee for the other persons interested;[5] and if a settlor creates a trust of a leasehold interest, he cannot renew the lease for his own benefit.[6]

If a trustee, upon his representations, acquires an absolute interest in the trust-property by virtue of an Act of the Legislature, he will be a trustee of the interest he has acquired.[7] Where several persons are jointly interested in a lease, one of them cannot obtain a renewal to himself,[8] as for instance, in the case of one of several partners obtaining a renewal of the lease of the partnership premises.[9]

[1] Sel. Cas., Ch., 61.

[2] Mulvany *v.* Dillon, 1 B. & B., 417; Griffin *v.* Griffin, 1 Sch. & Lef., 352.

[3] Acheson *v.* Fair, 3 Dr. & War., 512; Giddings *v.* Giddings, 3 Russ., 241.

[4] Griffin *v.* Griffin, 1 Sch. & Lef., 354; Blewett *v.* Millett, 7 Bro. P. C., 367.

[5] James *v.* Dean, 11 Ves., 383.

[6] Colegrave *v.* Manby, 6 Madd., 72; Tanner *v.* Elworthy, 4 Beav., 487.

[7] Cooper *v.* Phibbs, L. R., 2 H. L. Cas., 149: see also Yem *v.* Edwards, 3 K. and J., 564; 1 DeG. and J., 598.

[8] Palmer *v.* Young, 1 Vern., 276; Hamilton *v.* Denny, 1 B. and B., 199; Jackson *v.* Welsh, L. and G., *t.*; Plunk, 346.

[9] Featherstonhaugh *v.* Fenwick, 17 Ves., 311; Clegg *v.* Edmondson, 22 Beav., 125; 8 D. M. G., 787; Clegg *v.* Fishwick, 1 Mac. and G., 294; Clements *v.* Hall, 2 DeG. and J., 173.

A mortgagee who renews a lease must hold it for the benefit of the mortgagor.[1] A trustee cannot, by fraudulently incurring a forfeiture of the lease of the trust-property, obtain a renewal to himself.[2] So a tenant who fraudulently fails to pay Government revenue, in consequence of which the estate is sold, and becomes the purchaser, will be declared a trustee of the land for the lessor.[3] Where a trustee who has a right to obtain a renewal sells the right, the trust will attach upon the purchase-money in his hands.[4]

Remedy.

The trustee will have to assign the renewed lease free from all incumbrances, except an under-lease made *bonâ fide* at the best rent,[5] and he must account for mesne rents and profits,[6] even though the lease has expired.[7] The lessor will be entitled to be indemnified against covenants entered into upon the renewal, to his costs,[8] and to money laid out upon lasting improvements.[9] If the trustee has parted with his interest in the renewed lease to a volunteer,[10] or to a purchaser with notice,[11] the *cestui que trust* will, nevertheless, be entitled to the same remedies as against the trustee.[12]

Agent of trustee.

A mere agent of a trustee will not be made to account to the *cestui que trust* as a constructive trustee,[13] unless he becomes a party to the breach of trust, when he will be liable to the extent of his participation.[14]

Legal adviser gaining advantage by ignorance.

A legal adviser is bound to give sufficient advice to his client; and if any advantage or property comes to him by his

[1] Rakestraw *v.* Brewer, 2 P. Wms., 510; Nesbitt *v.* Tredennick, 1 B. and B., 29.
[2] Hughes *v.* Howard, 25 Beav., 575.
[3] Balkrishna Vasudev *v.* Madhavrav Narayan, I. L. R., 5 Bomb., 73.
[4] Owen *v.* Williams, Amb., 734.
[5] Bowles *v.* Stewart, 1 Sch. and Lef., 230.
[6] Mulvany *v.* Dillon, 1 B. and B., 409; Eyre *v.* Dolphin, 2 B. and B., 290.
[7] Eyre *v.* Dolphin, 2 B. and B., 290.
[8] Giddings *v.* Giddings, 3 Russ., 241; James *v.* Dean, 11 Ves., 383; Lawrence *v.* Maggs, 1 Eden, 453.
[9] Walley *v.* Walley, 1 Vern., 484; Lawrence *v.* Maggs, 1 Eden, 453.
[10] Bowles *v.* Stewart, 1 Sch. and Lef., 209; Eyre *v.* Dolphin, 2 B. and B., 290.
[11] Walley *v.* Walley, 1 Vern., 484; Eyre *v.* Dolphin, 2 B. and B., 290; Parker *v.* Brooke, 9 Ves., 583; Coppin *v.* Fernyhough, 2 Bro. C. C., 291.
[12] See Sahebzada Singh *v.* Ghundaree Roy, 1 W. R., 256.
[13] Myler *v.* Fitzpatrick, 6 Madd., 360; Davis *v.* Spurling, 1 R. and M., 64; Maw *v.* Pearson, 28 Beav., 196.
[14] Portlock *v.* Gardner, 1 Hare, 606; Bodenham *v.* Hoskyns, 2 D. M. G., 903.

LECTURE IV.

ignorance or the neglect of his duty, he will be a constructive trustee for the benefit of the person who would have benefited, if the adviser had done his duty. "Whether," said Lord Eldon,[1] "you meant fraud or not, you who have been wanting in what I conceive to be the duty of an attorney, if it happens that you get an advantage by that neglect, you shall not hold that advantage, but you shall be a trustee of the property for the benefit of that person who would have remained entitled to it, if you had known what you ought as an attorney to have known; and not knowing it, because you ought to have known it, you shall not take advantage of your own ignorance. It is too dangerous to mankind, that those who are bound to advise, and who being bound to advise ought to be able to give sound and sufficient advice, it is too dangerous to allow that they shall ever take advantage of their own ignorance—of their own professional ignorance—to the prejudice of others."[2]

When a barrister prepared a will for a friend, of which he was appointed executor, and in that capacity became entitled to the personal estate of the testator, he was decreed to hold it as a trustee for the next-of-kin. "The testator's intention," said Lord Chancellor Hart, "was not directed to his personal estate, and he thought he was only disposing of his real estate, it became the bounden duty of the defendant to have informed him, that if he made no disposition of his personal estate, the law, in consequence of his being the executor, would entitle him to retain it for his own benefit. He was bound to inquire of the testator, in plain and distinct terms, whether it was his will that the defendant should so retain the personal estate for his own benefit. . . . . The defendant has stated that he did not know the rule of law which gives to an executor the undisposed of residue. Be it so; but in the administration of justice, what ought to result from that ignorance? The testator relied on the defendant's knowledge of law as well as on his integrity. Will the avowal of ignorance of the law in the legal adviser justify the disinheriting of the testator's relations in favour of that adviser."[3]

[1] Bulkley *v.* Wilford, 2 C. and F., 102.

[2] And see Segrave *v.* Kirwan, Beat., 157; Nanney *v.* Williams, 22 Beav., 452.

[3] Segrave *v.* Kirwan, Beat., 157: and see Bulkley *v.* Wilford, 2 C. & F., 102; Garrett *v.* Wilkinson, 2 DeG. and Sm., 244.

LECTURE IV.

Gifts to persons in fiduciary capacity.

Courts of equity exercise jurisdiction to set aside voluntary gifts made to persons standing in a fiduciary relation to the donor. The relief is granted upon the principle of public policy, and applies to all the variety of relations in which dominion may be exercised by one person over another.[1] For instance, if a legal, medical, or spiritual adviser by availing himself, of his situation as such adviser, gains some pecuniary advantage from the person whom he advises, he will be treated as a trustee.[2]

Voluntary gift where no fiduciary relation when set aside.

A voluntary gift to a person who does not stand in any fiduciary or confidential position towards the donor, will not be set aside if there was no fraud, surprise, or undue influence, and the donor acted of his own free will, however improvident the gift may be. In *Villiers* v. *Beaumont*[3] Lord Nottingham said, that if a man will improvidently bind himself up by a voluntary deed, and not reserve liberty to himself by a power of revocation, the Court will not loose the fetters he hath put upon himself, but he must lie down under his own folly; for if the Court gave relief in such a case, it would establish the proposition that a man can make no voluntary disposition of his estate, but by his will only, which would be absurd. *Primâ facie* such a gift is good, but it will be set aside if the donor can prove fraud, surprise, or undue influence.[4]

Onus of proof where fiduciary relation exists.

Where the fiduciary relation exists, the onus of proving that the transaction is righteous is on the donee.[5] The Evidence Act provides (s. 111) that where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. And the following illustrations are given:—(*a*) "The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney; (*b*) the

[1] Huguenin *v.* Basley, 14 Ves., 273; Dent *v.* Bennett, 4 M. and Cr., 277; Pushong *v.* Munia Halwani, 1 B. L. R., A. C., 95. And see Contract Act, IX of 1872, ss. 15—22.

[2] See Act I of 1877, s. 2, illus. (*b*).

[3] 1 Vern., 100.

[4] Hunter *v.* Atkins, 3 M. and K., 113; Toker *v.* Toker, 31 Beav., 629.

[5] Gibson *v.* Jeyes, 6 Ves., 266: Wright *v.* Vanderplank, 8 D. M. G., 133; Hoghton *v.* Hoghton, 15 Beav., 299; Cooke *v.* Lamotte, *ibid*, 234; Sharp *v.* Leach, 31 Beav., 491; Smith *v.* Kay, 7 H. L. Cas., 780; Turner *v.* Collins, L. R., 7 Ch., 329.

LECTURE IV.

good faith of a sale by a son just come of age to his father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father."

Where it does not.

Where the fiduciary relation does not exist, a person who takes a benefit under a voluntary gift which is not subject to a power of revocation, has thrown upon him the burden of proving that the gift was meant by the donor to be irrevocable. A gift not meant to be irrevocable, but not subject to a power of revocation, may be set aside at the instance of the donor.[1] Even where the matter appears to rest upon a good consideration, as where there is a sale, the Court will inquire into the circumstances, with a view to ascertain whether undue influence was exercised or not.[2]

Spiritual influence.

If the donee is a person who exercises influence by means of his spiritual ascendency over the donor, the gift will be set aside.[3]

Parent and child.

The Court looks with suspicion upon gifts made by a child to a parent shortly after attaining majority, and such gifts will be set aside if there is any appearance of undue influence having been exercised by the parent. Where a father who had advanced a son during his minority took a bond from the son on his attaining majority for a much greater amount than the sums advanced, the son being without means, the transaction was set aside; Lord Northington saying:—"If the obligor gives a voluntary bond, and never complains of any imposition or hardship in obtaining it, the Court will only postpone it to creditors, and not set it aside for other volunteers. Nay, if it be given with advice and deliberation, this Court will not set it aside for the obligor. But if a man gives a voluntary bond for more than he is able to pay, the transaction speaks weakness on the one side and a sort of imposition on the other."[4] The Court will not interfere where the transaction is fair and reasonable, and no undue influence has been exercised.[5] The principles upon which the Court acts in transactions of this nature were thus stated by Lord Langdale in *Archer* v. *Hudson*.[6] "Nobody has ever asserted that there

[1] Wollaston *v.* Tribe, L. R., 9 Eq , 44.
[2] Clarke *v.* Malpas, 31 Beav., 80 ; Baker *v.* Monk, 33 Beav., 419.
[3] Huguenin *v.* Basley, 14 Ves., 273; Norton *v.* Relly, 2 Eden, 286 ; Nottidge *v.* Prince, 2 Giff., 246 ; Lyon *v.* Home, L. R., 6 Eq., 655.
[4] Carpenter *v.* Hariot, 1 Eden, 338.
[5] Blackborn *v.* Edgeley, 1 P. Wms., 600, 606 ; Jenner *v.* Jenner, 2 DeG. F. and J., 359 ; Baker *v.* Bradley, 7 D. M. G., 597.
[6] 7 Beav., 551, 560.

cannot be a pecuniary transaction between a parent and child, the child being of age; but everybody will affirm in this Court, that if there be a pecuniary transaction between parent and child, just after the child attains the age of twenty-one years, and prior to what may be called a complete 'emancipation,' without any benefit proving to the child, the presumption is, that an undue influence has been exercised to procure that liability on the part of the child, and that it is the business and the duty of the party who endeavours to maintain such a transaction, to show that that presumption is adequately rebutted; and that it may be adequately rebutted is perfectly clear. This Court does not interfere to prevent an act even of bounty between parent and child, but it will take care (under the circumstances in which the parent and child are placed before the emancipation of the child) that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control."

Persons *in loco parentis.*

The principles upon which the Court acts in dealing with transactions between parent and child, will be applied in dealings between a minor who has recently attained his majority, and a person who has stood towards him *in loco parentis.*[1]

Guardian and ward.

So, gifts from a ward to a guardian made shortly after the ward's attaining majority will be set aside if there is any suspicion of undue influence on the part of the guardian. "Where," said Lord Hardwicke,[2] "a man acts as guardian, or trustee in the nature of a guardian, for an infant, the Court is extremely watchful to prevent that person's taking any advantage immediately upon his ward or *cestui que trust* coming of age, and at the time of settling accounts or delivering up the trust, because an undue advantage may be taken. It would give an opportunity either by flattery or force, by good usage unfairly meant, or by bad usage imposed, to take such an advantage; and therefore the principle of the Court is of the same nature with relief in this Court on the head of public utility . . . . All depends upon public utility; and therefore the Court will not suffer it, though, perhaps, in a particular instance there may not be actual unfairness . . . . The rule of the

[1] Archer *v.* Hudson, 7 Beav., 551; Revett *v.* Harvey, 1 S. and S., 502; Dettmar *v.* Metropolitan and Provincial Bank, 1 H. and M., 641.
[2] Hylton *v.* Hylton, 2 Ves., 549.

LECTURE IV.

Court as to guardians is extremely strict, and in some cases does infer some hardship; as where there has been a great deal of trouble, and he has acted fairly and honestly, that yet he shall have no allowance; but the Court has established that on great utility, and on necessity, and on this principle of humanity, that it is a debt of humanity that one man owes to another, as every man is liable to be in the same circumstances."[1] If, however, the relation of guardian and ward has been completely determined, and the presumption of undue influence has been successfully rebutted, a gift from the ward will be allowed to hold good.[2]

Gift to legal adviser.

A legal adviser, whether counsel, attorney, or vakeel, can take no benefit from his client while he is acting for him in a professional capacity, beyond his regular professional charges. In order to support a gift from a legal adviser to his client, it must appear that the relation has been dissolved.[3] If it is endeavoured to make the gift good, by expressing that valuable consideration has been given by the legal adviser, evidence will be admissible to prove that the consideration is fictitious.[4]

If there is no suit pending, and no undue influence has been exercised by the legal adviser, a gift to him may be supported,[5] and he may take a benefit under a will if it can be proved that the testator acted freely.[6]

In the class of cases we have just considered, undue influence is presumed to have been exerted until the contrary is proved, and the person benefited is bound to show that all the terms and conditions of the contract are fair, adequate, and reasonable.[7]

Extent of rule.

The rule extends to all the relations in which dominion may be exercised by one person over another, even though

[1] See also Ramkissen Pajoshee Mahapatur v. Hurrykissen Mahapatur, 15 S. D. A., 274, and the notes to Huguenin v. Basley, 2 Wh. and T. L. C., 585.

[2] Hatch v. Hatch, 9 Ves., 296; Hunter v. Atkins, 3 M. and K., 113.

[3] Moore v. Prance, 9 Hare, 299; Walker v. Smith, 29 Beav., 394; Gardener v. Ennor, 35 Beav., 549; Broun v. Kennedy, 4 D. G. J. and S., 217; Rujabai v. Ismail Ahmed, 7 Bom., O. C., 27; Pushong v. Munia Halwani, 1 B. L.R., A. C., 95.

[4] Tomson v. Judge, 3 Drew., 306.

[5] Oldham v. Hand, 2 Ves., 259; Harris v. Tremenheere, 15 Ves., 34; Nuthoo Lall v. Buddree Pershad, 1 N. W. P., 1.

[6] Hindson v. Weatherill, 5 D. M. G., 301; Walker v. Smith, 29 Beav., 394.

[7] Pushong v. Munia Halwani, 1 B. L. R., A. C., 95; Nuthoo Lall v. Buddree Pershad, 1 N. W. P., 1; and see *ante*, p. 111.

no actual fiduciary relationship in the strictest sense of the words exists. Thus gifts by patients to medical attendants,[1] by a younger sister to an elder,[2] by a woman to her intended husband,[3] and gifts obtained by operating on the fears of another[4] have been set aside.

Gift in expectation of death.

A voluntary deed, which contains no power of revocation, executed in the expectation of immediate death, will be set aside, even though there has been no undue influence, if the settlor did not intend that it should be operative in case he recovered.[5]

Strangers.

The Court has power to relieve against strangers. "Whoever," said Wilmott, C.J.,[6] "receives the gift, must take it tainted and infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out among his relations and friends will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it." But the Court will not interfere as against a *bonâ fide* purchaser without notice.[7]

Principles on which Court acts.

The principles upon which Courts of Equity act in setting aside voluntary gifts to persons standing in a fiduciary relation to the donor were thus stated by Lord Brougham in *Hunter* v. *Atkins*:[8] "There are certain relations known to the law as attorney, guardian, trustee; if a person standing in these relations to client, ward, or *cestui que trust*, takes a gift or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, &c., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule rightly considered is, that the person standing in such relation must, before he can take a gift, or even enter into a transaction, place himself exactly in the same position as a stranger

[1] Dent *v.* Bennett, 4 My. and Cr., 269.
[2] Harvey *v.* Mount, 8 Beav., 439.
[3] Page *v.* Horne, 11 Beav., 227.
[4] Williams *v.* Bayley, L. R., 1 H. L., 200.
[5] Forshaw *v.* Welsby, 30 Beav., 243.
[6] Bridgeman *v.* Green, Wilm., 58.
[7] Blackie *v.* Clark, 15 Beav., 595; and see further the notes to Huguenin *v.* Basley, 2 Wh. and T. L. C., 556.
[8] 3 M. and K., 135.

LECTURE IV.

would have been in, so that he may gain no advantage whatever from his relation to the other party beyond what may be the natural and unavoidable consequence of kindness arising out of that relation. A client, for example, may naturally entertain a kindly feeling towards an attorney or solicitor by whose assistance he has long benefited; and he may fairly and wisely desire to benefit him by a gift, or, without such an intention being the predominating motive, he may wish to give him the advantage of a sale or a lease. No law that is tolerable among civilized men—men who have the benefits of civility without the evils of excessive refinement and overdone subtlety—can ever forbid such a transaction, provided the client be of mature age and of sound mind, and there be nothing to show that deception was practised, or that the attorney or solicitor availed himself of his situation to withhold any knowledge, or exercise any influence hurtful to others and advantageous to himself. In a word, standing in the relation in which he stands to the other party, the proof lies upon him (whereas in the case of a stranger, it would lie on those who opposed him) to show that he has cut off, as it were, the connection which bound him to the party giving or contracting, and that nothing has happened which might not have happened had no such connection subsisted. . . . . The rule, I think, cannot be laid down much more precisely than I have stated it, that where the known and defined relation of attorney and client, guardian and ward, trustee and *cestui que trust*, exists, the conduct of the party benefited must be such as to sever the connection, and to place him in the same circumstances in which a mere stranger would have stood, giving him no advantage, save only whatever kindness or favour may have arisen out of the connection; and that where the only relation between the parties is that of friendly habits, or habitual reliance on advice and assistance, accompanied with partial employment in doing some sort of business, care must be taken that no undue advantage shall be made of the influence thus acquired. The limits of natural and often unavoidable kindness with its effects, and of undue influence exercised or unfair advantage taken, cannot be more rigorously defined. Nor is it, perhaps, advisable that any strict rule should be laid down—any precise line drawn. If it were stated that certain acts should be the only tests of undue influence, or

that certain things should be required in order to rebut the presumption of it, such as the calling in a third person, how easy would it be for cunning men to avoid the one, or protect themselves by means of the other, and so place their misdeeds beyond the denunciations of the law, and secure the fruits of them out of its reach! If any one should say that a rule is thus recognized, which from its vagueness cannot be obeyed, because it cannot well be discerned, the answer is at hand. All men have the interpreter of it within their own breasts; they know the extent of their influence, and are conscious whether or not they have taken advantage of it in a way which they would feel indignant that others similarly circumstanced should do with regard to themselves.

The circumstances of each case, therefore, are to be carefully examined and weighed, the general rule being of a kind necessarily so little capable of exact definition; and on the result of the inquiry, we are to say—Has or has not an undue influence been exerted—an undue advantage taken?"

Badges of fraud.

It has been held that a fictitious consideration inserted in the deed is a badge of fraud.[1] So, where there has been concealment from those who ought naturally to have been made acquainted with the transaction.[2] But is not necessary that there should have been such acts as these in order to enable the Court to interfere. The Court will inquire whether the grantor not only executed the deed voluntarily, but also whether he had a full knowledge of the consequences of his act.[3] The mere fact that the deed was read over to him is not sufficient, it must be proved that he understood its nature.[4] And the case will be stronger against the donee when the deed was not prepared under the donor's instructions and was not read over to him.[5] Where persons stand in a fiduciary relation to each other, the party benefited must be able to show that the donor had competent and independent advice, and the capacity of the donor is of importance.[6]

Independent advice.

[1] Bridgeman *v.* Green, 2 Ves., 627; Gibson *v.* Russell, 2 Y. & C. C. C., 104.
[2] Jevers *v.* Jevers, 1 Bro. P. C., 272; Scrope *v.* Offley, *ib.*, 276.
[3] Huguenin *v.* Basley, 14 Ves., 300; Pratt *v.* Barker, 4 Russ., 507; Toker *v.* Toker, 31 Beav., 629.
[4] Hoghton *v.* Hoghton, 15 Beav., 278; Anderson *v.* Elsworth, 3 Giff., 154.
[5] Clarkson *v.* Hanway, 2 P. W., 203.
[6] Griffith *v.* Robins, 3 Madd., 191; Baker *v.* Bradley, 7 D. M. G., 597; Rhodes *v.* Bates, L. R., 1 Ch., 252; Rujabai *v.* Ismail Ahmed, 7 Bom., O. C., 35.

LECTURE IV.

At whose instance set aside.

When undue influence is proved, the deed may be set aside at the instance of the donor or grantor, or after his death, of his representatives or devisees.[1] If the donor or settlor himself requires the aid of the Court to transfer a fund in Court, which is the subject of the settlement, to the donee, the Court cannot refuse its assistance, whether the settlement may or may not, be impeachable upon the ground of undue influence.[2]

If the subject-matter of the gift can be traced into the possession of third persons, it will be affected by the fraud or undue influence which attached to the original transaction.[3]

Acquiescence.

The *cestui que trust*, if competent to contract, must seek his remedies within a reasonable time, otherwise he may be barred by acquiescence.[4]

Confirmation and acquiescence.

Although the evidence may show the existence of undue influence at the time of the settlement or gift, it will not be set aside, if the settlor has, during a course of years and in several transactions, acted upon it and treated it as in all respects valid.[5] But acquiescence must be shown to be *after* the discovery of the right to impeach a transaction,[6] in which case it will preclude the parties acquiescing from raising objections afterwards.[7] And where a client dealing with his solicitor executes a voidable instrument, and afterwards chooses to confirm it by will, the confirmation will be effectual.[8] In order that acquiescence or confirmation may be valid, there must be no continuing influence, as otherwise there would be no free agency on which to found acquiescence.[9] And where a confidential and fiduciary relation is shown to exist, its continuance will be presumed, unless there is direct evidence of its termination.[10]

[1] Anderson *v.* Elsworth, 3 Giff., 154.

[2] *Re* Metcalfe, 2 D. J. & S., 122.

[3] Bridgeman *v.* Green, 2 Ves., 627; Huguenin *v.* Basley, 14 Ves., 274. In these cases, however, the persons actually in possession or enjoyment of the property so obtained were not purchasers for value without notice, but mere volunteers.

[4] Clegg *v.* Edmondson, 8 D. M. G., 787; Peddamuthulaty *v.* Timma Reddy, 2 Mad. H. C., 270.

[5] Brown *v.* Carter, 5 Ves., 862; Wright *v.* Vanderplank, 2 K. & J., 1; affd., 2 Jur., N. S., 599; Dimsdale *v.* Dimsdale, 3 De., 556; Jarratt *v.* Aldam, L. R., 9 Eq., 463.

[6] King *v.* Savery, 5 H. L. Cas., 627.

[7] Skottowe *v.* Williams, 3 D. F. & J., 535.

[8] Stump *v.* Gaby, 2 D. M. G., 623.

[9] Hatch *v.* Hatch, 9 Ves., 292; Sharp *v.* Leach, 31 Beav., 491.

[10] Rhodes *v.* Bates, L. R., 1 Ch., 252.

Laches and considerable delay in applying to the Court to set aside an instrument impeachable by reason of undue influence will, in general, be a bar to relief.[1]

Laches.

Costs.

Trustees are bound to protect the interests of their *cestuis que trustent*, and are justified, when they are called upon to transfer a fund pursuant to an arrangement between persons standing in a fiduciary relation to one another, in taking every precaution to ascertain that no fraud or undue influence has been exercised by the person to whom the fund is to be transferred. If, however, they act capriciously, or, having ascertained that the transaction is not one which the Court would set aside, they persist in refusing to transfer, and so render a suit necessary, they will be liable to pay costs.[2]

[1] Barwell *v.* Barwell, 34 Beav., 371; Skottowe *v.* Williams, 3 D. F. & J., 535: see Proctor *v.* Robinson, 35 Beav., 329; Turner *v.* Collins, L. R., 7 Ch., 329.

[2] See Firmin *v.* Pulham, 2 DeG. & S., 99; *Re* Cater, 25 Beav., 361; King *v.* King, 3 Jur., N. S., 609; *Re* Metcalfe, 2 D. J. & S., 122.

LECTURE V.

PARTIES TO THE TRUST.

Acceptance of trust — Trustees also executors — Acting as agent — Executor of an executor — Renunciation of probate — Partial acceptance — Recitals in deed as to state of trust — Trustee in fact — Liability of trustee — By whom trust may be created — General rule — The Sovereign — Corporations — Prizes of war — Infants — Married women — Stridhan — Alien — Persons convicted of certain offences — Grantee under sanad — Who may be a *cestui que trust* — The Government — Corporations — Aliens — Who may be a trustee. Persons under disability — Aliens — The Sovereign — Not the Government of India — Corporation — Presidency banks — Married women — Insolvent — *Cestuis que trustent* — Relatives — Number of trustees — Disclaimer — How made — Gift to trustee or executor.

Acceptance of trust.

A TRUSTEE may accept the trust by signing the trust-deed when there is one,[1] or, in the case of a will, by express declaration of his assent. *Primâ facie* he is assumed to assent to a devise,[2] and his acceptance may be implied from his neglect to disclaim for a long time, such as twenty years,[3] even though he has not acted in the trust.[4] And acceptance may be implied from acts of a trustee in relation to the trust-estate.[5] It is difficult to lay down any general rule as to what acts of a trustee will amount to acceptance. An executor who takes out probate of the will of his testator, thereby accepts the office, and becomes responsible for any loss incurred by the acts of his co-executor;[6] he cannot escape responsibility on the ground that he has taken no

[1] Buckeridge *v.* Glasse, 1 Cr. and Ph., 131.

[2] *Doe v.* Harris, 16 M. & W., 517; Lord Montford *v.* Lord Cadogan, 19 Ves., 638.

[3] Wise *v.* Wise, 2 J. & Lat., 402.

[4] See *Re* Uniacke, 1 J. & Lat., 1; *In re* Needham, *ib.*, 34.

[5] Lord Montford *v.* Lord Cadogan, 19 Ves., 638.

[6] Mucklow *v.* Fuller, Jac., 198; Booth *v.* Booth, 1 Beav., 135.

active part in the administration of the estate.[1] So if he interferes with the assets of the testator, he will be liable even though he does not take out probate.[2] Thus, where a co-executor who had not proved, after the death of the executor who had proved, gave a power-of-attorney to sell a small part of the testator's assets, which was not acted upon, and had not further intermeddled, it was held that he had accepted the office.[3]

So the joining in an assignment of a lease, for the purpose of passing the legal estate, has been considered to be of itself sufficient evidence that the executor had accepted and acted in the trusts of the will:[4] and an executor will be liable if he exercises acts of authority or ownership over the testator's estate.[5]

Trustees also executors.

If executors are also appointed trustees, taking out probate amounts to an acceptance of the trusteeship as well as of the executorship.[6]

Acting as agent.

If a trustee under a will does not expressly accept, but receives the rents and profits of the trust-property, he cannot escape from liability to account, on the ground that he acted merely as agent or factor.[7] In *Lowry* v. *Fulton*[8] a trustee who acted as agent, and who had not proved, was held not to have accepted the trust; but that was a peculiar case, and cannot be considered as an authority against the general rule.[9]

Executor of an executor.

According to English law, an executor who takes probate of the will of an executor, becomes executor of the will of the first testator, and cannot renounce probate of the first will, and take probate of the second.[10]

But this is not the law as regards persons governed by the Succession Act or the Probate and Administration Act, 1881.[11]

[1] Styles *v.* Guy, 1 Mac. & G., 431.

[2] Graham *v.* Hill, 3 Hill's MSS., 239, cited in Churchill *v.* Lady Hobson, 1 P. Wms., 241 (*n*); White *v.* Barton, 18 Beav., 192.

[3] Cummins *v.* Cummins, 8 Ir. Eq. Rep., 723: see also Doyle *v.* Blake, 2 Sch. & Lef., 231; Malzy *v.* Edge, 2 Jur., N. S., 80.

[4] Urch *v.* Walker, 3 My. & Cr., 702.

[5] James *v.* Frearson, 1 Y. & C. C. C., 375.

[6] Mucklow *v.* Fuller, Jac., 198; Booth *v.* Booth, 1 Beav., 125; Williams *v.* Nixon, 2 Beav., 472

[7] Conyngham *v.* Conyngham, 1 Ves., 522; Montgomery *v.* Johnson, 11 Ir. Eq. Rep., 476; *Doe* *v.* Harris, 16 M. & W., 517.

[8] 9 Sim., 115.

[9] See further as to acts of acceptance, Lewin on Trusts, Ch. XI.

[10] In the Goods of Perry, 2 Curt., 655; Brooke *v.* Haynes, L. R., 6 Eq., 25.

[11] Act X of 1865, s. 229; Act V of 1881, s. 19; and see DeSouza *v.* Secretary of State, 12 B. L. R., 423.

LECTURE V.

Renunciation of probate.

The renunciation of probate by a person named as executor and trustee, is not in itself a disclaimer of the trust, but it is one circumstance of evidence, and if there be no proof of his ever having acted, the Court, after a long lapse of time, as sixty years, will presume a disclaimer.[1] Where real and personal estate was devised and bequeathed to *B*, upon trust, for sale and conversion, and upon further trusts for the heir-at-law of the testator absolutely, and *B* renounced probate, and died three years afterwards without having disclaimed the trusts, it was held, that he must be taken to have intended to disclaim them when he renounced probate.[2]

Where a person named as a trustee refused to act, but only took the trust-deed into his possession for safe custody, until some one could be found to undertake the trust, it was held, that there was not enough to charge him.[3]

Partial acceptance.

If the instrument of trust contains distinct and separate trusts, and a trustee is appointed to execute all the trusts, he cannot accept some and disclaim the others, but must accept all or disclaim all.[4]

Although the general rule is, that if a trustee acts in the trust, or intermeddles with the trust-property, he will be held to have accepted the trust, yet he may show that acts which apparently show an acceptance are referrible to some other ground.[5] But he cannot so act with reference to a trust-fund as to leave himself at liberty to say afterwards, either that he did, or did not, act as trustee.[6] Parol evidence is admissible upon the question of acceptance or non-acceptance of the trust.[7]

Recitals in deed as to state of trust.

If the instrument creating the trust contains recitals specifying the trust-property, the trustees should, as a matter of precaution, ascertain that the recitals are correct, for otherwise they may be held liable for the property mentioned. But they will not be estopped from averring against, or offering evidence to controvert, a recital in the deeds contrary to the fact, which has been

[1] Lewin, 7th Ed., 185, citing M'Kenna *v.* Eager, 9 I. R. C. L., 79: and see Earl Granville *v.* M'Neile, 7 Hare, 156.

[2] *In re* Gordon; Roberts *v.* Gordon, L. R., 6 C. D., 531.

[3] Evans *v.* John, 4 Beav., 35.

[4] Urch *v.* Walker, 3 My. & Cr., 702.

[5] Stacey *v.* Elph, 1 M. & K., 195; Dove *v.* Everard, 1 R. & M., 231; Lowry *v.* Fulton, 9 Sim., 115.

[6] Conyngham *v.* Conyngham, 1 Ves., 522; Stacey *v.* Elph, 1 M. & K., 195.

[7] James *v.* Frearson, 1 Y. & C. C. C., 370.

introduced into the deed by mistake of fact, and not through their own fraud or deception.[1] In *Fenwick* v. *Greenwell*[2] Lord Langdale said: "A doubt has been raised as to whether Miss Cuthbertson possessed the £5,000 stock at the time of the marriage. Now I cannot say, that the trustees are bound by the recital of that fact contained in the deed; we have had so many instances of parties representing that they were entitled to particular property, and which representation has afterwards turned out to be wholly untrue, that it would be unjust and dangerous to bind third parties by such representations, and I am not aware that it has ever been held, that trustees are bound by the representations of parties about to be married of the state of their property. I do not, therefore, accede to the argument that the recital alone binds the trustees."[3]

Trustee in fact.

A person may become a trustee in fact though not of right, and if he becomes possessed of a trust fund with notice of the trust, he will be bound by it.[4] The representatives of a deceased trustee will incur personal liability by paying away the residue of their testator's estate, if afterwards a debt is discovered to which it is liable, though they had no notice.[5] And if property has been distributed among the legatees of a person who has committed a breach of trust, though in ignorance of this fact, those who are damnified by the breach of trust may recover from the legatees.[6]

When executors have made an assignment on the appointment of a new trustee, they lose their character of executors and become trustees only.[7] And an executor, to whom a legacy is given upon trust, ceases to hold it as executor, from the time he has appropriated it to the purposes of the trust.[8]

Liability of trustee.

The liability of trustees for loss to the trust estate is the same, whether the acceptance of the trust has been express, or is implied by a Court of equity from their acts.[9]

[1] Brooke v. Haynes, L. R., 6 Eq., 25. [2] 10 Beav., 418.
[3] And see Gore v. Bowser, 3 Sm. & Giff., 6; Story v. Gape, 2 Jur., N. S., 706.
[4] Rackham v. Siddal, 1 Mac. & G., 607; Hennessey v. Bray, 33 Beav., 96.
[5] Knatchbull v. Fearnhead, 3 My. & Cr., 122.
[6] March v. Russell, 3 My. & Cr., 31.
[7] Smith v. Smith, 1 Dr. & S., 384. See Act X of 1865, ss. 316—326; Act V of 1881, ss. 135—145.
[8] Phillipo v. Munnings, 2 My. & Cr., 309; Dix v. Burford, 19 Beav., 409.
[9] Lord Montford v. Lord Cadogan, 19 Ves., 638. As to the nature of the debt created in England, see Lewin, 7th Ed., 189.

LECTURE V.

By whom trust may be created. General rule.

We have now to consider by whom a trust may be created. As a general rule, it may be said that every person who is competent to contract may create a trust. The Indian Contract Act provides that—

"Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject:"[1]

And a person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it,—

"He is capable of understanding it, and of forming a rational judgment as to its effect upon his interests. A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind."[2]

The Act contains the following illustrations:—

"A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

"A sane man who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts."

The Sovereign.

The Sovereign, as to his private property, may, by Letters Patent, grant it to one person upon trust for another;[3] and the Government of India, as it has the power of disposing of public property, may convey such property to trustees if it think fit.

Corporations.

Corporate bodies may create trusts. They have the right to alienate the property vested in them, and in consequence may vest it in a trustee.[4] This right has been taken away in England by the Statute of 5 and 6 Wm. IV, c. 76; but as no similar Statute exists in this country, I apprehend that the law as it stood before the Statute would be enforced here.

Prizes of war.

Prizes of war vest in the sovereign, and are commonly, by the Royal Warrant, granted to trustees, upon trust to distribute in a prescribed mode among the captors; but an instrument of this kind is held not to vest an interest in the *cestuis que trustent*, which they can enforce in equity, but

[1] Act IX of 1872, s. 11. [2] *Ibid*, s. 12. [3] Lewin, 7th Ed., 21.
[4] Mayor of Colchester *v.* Lowten, 1 V. & B., 226; Evan *v.* The Corporation of Avon, 29 Beav., 144.

it may be at any time revoked or varied at the pleasure of the sovereign before the general distribution.[1]

Infants.

An infant, as we have seen, cannot contract, and therefore cannot create a trust by any declaration during minority, nor can he create a trust by will.[2]

Married women.

Married women subject to the Indian Succession Act (X of 1865) may create trusts. Section 4 of the Act provides that no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried. This section, so far as regards property, abolishes, by implication, the doctrine of unity of persons between husband and wife.[3] So far as property is concerned, therefore, the wife has as much control over it as if she were unmarried. This section does not apply to Hindus, Mahomedans, Buddhists, Sikhs, or Jains.[4] By the Married Women's Property Act (III of 1874), s. 4—

"The wages and earnings of any married woman acquired or gained by her, after the passing of the Act, in any employment, occupation, or trade carried on by her, and not by her husband, and also any money or other property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all savings from, and investments of, such wages, earnings, and property, shall be deemed to be her separate property, and her receipts alone shall be good discharges for such wages, earnings, and property."

And she may, therefore, create a trust in respect of such property. This Act does not apply to Hindus, Mahomedans, Buddhists, Sikhs, or Jains.[5]

Stridhan.

With regard to Hindus, a married woman may create a trust of her *stridhan*, or any other property which is absolutely at her own disposal, as she can devise such property.[6] But she cannot devise property inherited from males, since her interest in it ceases at her death,[7] and therefore she cannot create a trust of such property to continue after her death, though she may create a trust of her life-interest.

[1] Alexander *v.* The Duke of Wellington, 2 R. & M., 35; Kinlock *v.* Secretary of State for India in Council, L. R., 15, C D., 1. As to the execution of the trust by the agency of persons deputed by the principals, see Tarragona, 2 Dod's Adm. Rep., 487.

[2] Act X of 1865, s. 46; Cossinath Bysack *v.* Hurrosoondery, 2 M. Dig, 198 (*n*).

[3] Proby *v.* Proby, I. L. R., 5 Calc., 357.

[4] Act III of 1874, s. 2.

[5] Section 2.

[6] See Mayne's Hindu Law and Usage, 2nd Ed., 312.

[7] *Ibid.*

LECTURE V.

Alien.

According to English law, an alien might always have acquired real estate, whether freeholds or chattels, by purchases, though he could not take it by operation of law, as by descent or *jure mariti;* and if he purchased it, he might have held it until office found, but could not give an alienee a better title than he had himself. An alien, therefore, could only create a trust of real estate until the Crown stepped in.

As to personal estate, an alien friend might, although an alien enemy could not be the lawful owner of chattels, personal, and might exercise the ordinary rights of proprietorship over them, and consequently create a trust.

The English law relating to aliens has not been introduced into India, and aliens here may acquire property freely, and deal with it as if they were British subjects.[1]

Persons convicted of certain offences.

In some cases the property of persons convicted of certain offences is liable to forfeiture. In every such case the offender is incapable of acquiring any property, except for the benefit of Government, until he has undergone the punishment awarded, or the punishment to which it shall have been commuted, or until he shall have been pardoned.[2] Whenever any person is convicted of an offence punishable with death, the Court may adjudge that all his property, moveable and immoveable, shall be forfeited to Government; and whenever any person is convicted of any offence for which he shall be transported or sentenced to imprisonment for a term of seven years or upwards, the Court may adjudge that the rents and profits of all his moveable and immoveable estate during the period of his transportation or imprisonment shall be forfeited to Government, subject to such provision for his family and dependants as the Government may think fit to allow during such period.[3]

In certain cases the forfeiture of property necessarily follows conviction. Any person who wages war against the Queen, or attempts to wage such war, or abets the waging of such war, or collects men, arms, or ammunition, or otherwise prepares to wage war with the intention of either waging, or being prepared to wage, war against the Queen, forfeits all his property in addition to any other punishment to which he may be sentenced.

[1] See Mayor of Lyons *v.* East India Co., 1 Moo. I. A., 175; Sarkies *v.* S. M. Prosonnomoyee Dossee, I. L. R., 6 Calc., 794.

[2] Act XLV of 1860, s. 62. [3] *Ibid.*

There is another class of offences where the forfeiture of specific property may form part of the punishment awarded. When offenders commit, or prepare to commit, depredation on the territories of any power at peace with the Queen, or receive property with the knowledge that it has been taken in waging war, or committing depredations on a power at peace with the Queen;[1] or if a public officer buys property which he is forbidden to buy, the specific property may be forfeited.[2]

No trust can, therefore, be created of property which may be forfeited if the Government choses to exercise its rights; and of course, no trust can be created where forfeiture necessarily follows the conviction.

Grantee under sanad.

Although a sanad granted by the Government of India, subsequent to the proclamation of March, 1858, of an estate in Oudh, confers an absolute legal title on the grantee, such grantee may, nevertheless, by an express declaration of trust, or by an agreement to hold in trust, constitute himself a trustee of the estate for a third party.[3]

Who may be a *cestui que trust.*

A trust may be created in favour of any person, or body of persons, so long as the purpose is lawful.

The Government may be a *cestui que trust.*[4]

The Government. Corporations.

In England a trust of lands cannot be limited to a corporation without a license from the Crown.[5] But as the Mortmain Acts do not apply to India,[6] apparently a corporation in this country may be a *cestui que trust.*

Aliens.

An alien also may be a *cestui que trust.*

Who may be a trustee. Persons under disability.

Any person may be a trustee, even an infant, or person of unsound mind, if the trust is purely passive, and does not require the exercise of prudence and discretion. For instance, a discretionary trust for sale cannot be exercised by an infant, for an infant is not a person competent to contract.[7] In *King* v. *Bellord,*[8] a testator devised estates upon trusts, requiring discretion as to the expediency, as to the time, and as to the manner of a sale, to three persons,

[1] Act XLV of 1860, ss. 126, 127. [2] *Ibid*, s. 169.

[3] Thakur Shere Bahadur Singh v. Thakurain Darino Kuar, I. L. R., 3 Calc., 645.

[4] See as to trusts in favour of the Sovereign Lewin, 7th Ed., 40.

[5] Lewin, 7th Ed., 41.

[6] Mayor of Lyons v. The East India Co., 1 Moo. I. A., 175; Sarkies v. Prosonnomoyee Dossee, I. L. R., 6 Calc., 794.

[7] Act IX of 1872, s. 11. [8] 1 H. and M., 343.

LECTURE V.

one of whom was an infant, and it was held, that a contract of sale entered into by these three trustees was not a valid contract which could be specifically performed. "There can be no doubt upon the authorities from the earliest times," said Wood, V. C., "that if a man by his will gives an infant a simple power of sale without an interest, the infant may exercise it. All the decisions on the subject are referred to by Lord St. Leonards in his work on 'Powers,' and I need not discuss them minutely. They all turn on the execution of powers, and there is not a single authority upon the question whether an infant can sell an estate devised to him upon trust for sale. There is an opinion of Mr. Preston, mentioned without disapproval by Lord St. Leonards, that an infant can exercise a power, even though it be coupled with an interest; but that is very different from selling an estate vested in an infant by a devise in fee.

"It is to be observed that all the cases relied on with reference to powers, have gone upon the principle that the infant is merely the instrument by whose hands the testator or donor acts. The donor, it is said, may use any hand, however weak, to carry out his intentions. This principle fails altogether to reach the case of a devise in trust to an infant. It is not in the power of the author of a trust to confer upon an infant a capacity in himself which the law does not give him, although he may make the infant his hand, his agent, to execute his purpose. He cannot give an estate to an infant, and say that he may sell it when the law says that he cannot do so."

It is not advisable, however, to appoint an infant as trustee. The only acts which he can perform are such as are purely ministerial, and he cannot be made to account for money received by him as trustee during his minority.[1] Infants, however, have no privilege to cheat men;[2] and a Court of Equity has jurisdiction to make an infant answerable, on his attaining majority, for a fraud committed by him during his minority, though it is not easy to determine in what cases the Court will thus exert itself.[3]

From the great inconveniences attending the appointment of an infant as trustee, there arises a strong presumption,

[1] Hindmarsh *v.* Southgate, 3 Russ., 327.
[2] Evroy *v.* Nicholas, 2 Eq. Cas. Abr., 489.
[3] Stikeman *v.* Dawson, 1 DeG. and Sm., 90; Wright *v.* Snowe, 2 DeG. and Sm., 321: and see the cases collected, Lewin, 7th Ed., 36.

wherever property is given to an infant, that he is intended to take it not as trustee but beneficially.[1]

LECTURE V.

Aliens.

An alien may be a trustee of either moveable or immoveable property. In England, before the Statute 33 Vict., c. 14, an alien could not effectually be a trustee in respect of freeholds, or chattels, real, for the policy of the law would not allow an alien to sue, or be sued, to the prejudice of the Crown touching lands in any Court of law or equity; and on inquisition found, the legal estate in the property vested by forfeiture in the Crown.[2] But this did not apply to personal property.[3] In this country, as we have seen,[4] the English law as to aliens is not applicable: and moreover, no person is by reason of his descent or place of birth exempted in any civil proceeding from the jurisdiction of any of the Courts,[5] and alien enemies residing in British India with the permission of the Governor-General in Council and alien friends may sue in the Courts of British India, as if they were subjects of Her Majesty. No alien enemy residing in British India, without such permission, or residing in a foreign country, may sue in any of such Courts.[6]

The Sovereign.

In England, the Sovereign may sustain the character of a trustee, so far as regards the capacity to take the estate and to execute the trusts; but great doubts have been entertained whether the subject can, by any legal process there, enforce the performance of the trust.[7]

Not the Government of India.

And it has recently been expressly decided that the Government of this country cannot be a trustee. In *Kinlock* v. *The Secretary of State for India*,[8] booty of war had been granted by Her Majesty by Royal Warrant to the Secretary of State for India in Council, 'in trust,' to distribute amongst the persons found entitled to share it by the decree of the Judge of the Court of Admiralty, to whom the matter had been referred by the Sovereign for that purpose, with a direction that doubts should be finally determined by the Secretary of State, unless Her Majesty should otherwise order. An action was brought against the Secretary of State by a person claiming to be entitled to share in the fund, and praying for an account. It was held,

[1] Lewin, 7th Ed., 36. [2] Fish *v.* Klein, 2 Mer., 431.
[3] Meinertzhagen *v.* Davis, 1 Coll., 335.
[4] *Ante*, p. 126. [5] Act X of 1877, s. 10.
[6] *Ib.*, 430. [7] See Lewin, 7th Ed., 29. [8] L. R., 15 C. D., 1.

LECTURE V.

that the warrant did not operate as a transfer of property or create a trust, and that the defendant, being merely the agent of the Sovereign to distribute the fund, was not liable to account to any of the parties entitled. James, L. J., said: "The Government of India is not, as it appears to me, capable of being a trustee; nor is the Secretary of State for India in Council (the name by which the Government can be sued) a person capable of being a trustee any more than the Attorney-General in this country would be, or any other person, who sued in certain cases for, or on behalf of, the Crown."

Corporations.

According to the technical rules upon which the doctrine of uses proceeded, a corporation could not have been seised to a use, for, it was said, it had no soul, and therefore no confidence could be reposed in it.[1] But on principles of ordinary and natural justice, a body corporate has been held to be compellable to execute a trust, thus abolishing the rule that there must be a person in whom the confidence is placed.[2] "*Primâ facie*," said Lord Romilly, M. R.,[3] "an ordinary Municipal Corporation has full power to dispose of all its property like any private individual, and the burden of proof lies on the person alleging the contrary to establish a trust. The trust may be of two characters; it may be of a general character, or of a private and individual character. A person might leave a sum of money to a corporation, in trust, to support the children of *B*, and pay them the principal at twenty-one. That would be a private and particular trust, which the children could enforce against the corporation, if the corporation applied the property for its own benefit. On the other hand, a person might leave money to a corporation, in trust for the benefit of the inhabitants of a particular place, or for paving or lighting the town. That would be a public trust for the benefit of all the inhabitants, and the proper form of suit, in the event of any breach of trust, would be by an information by the Attorney-General,[4] at the instance of all or some of the persons interested in the matter. If there was a particular trust in favor of particular persons, and they were

[1] Lewin, 7th Edn., 30.

[2] Green *v.* Rutherford, 1 Ves., 468; Attorney-General *v.* Whorewood, *ib.*, 536; Attorney-General *v.* Caius College, 2 Keen, 165.

[3] Evan *v.* The Corporation of Avon, 29 Beav., 149.

[4] As to the procedure in this country, see Act X of 1877, s. 539.

too numerous for all to be made parties, one or two might then sue on behalf of themselves and the other *cestuis que trustent* for the performance of the trust." LECTURE V.

There is a statutory exception to the general rule, that a corporation may be a trustee, in the case of the Presidency Banks,—that is to say, the Banks of Bengal, Madras, and Bombay. The Presidency Banks' Act (XI of 1870) provides that, except for the purpose of excluding the provisions of s. 17 (relating to the forfeiture of stocks and shares), the banks shall not be bound or affected by notice of any trust to which any stock or share may be subject in the hands of the proprietor or holder. And the law in England is similar. Presidency banks.

A married woman may be a trustee. In England it is not advisable to appoint a married woman as trustee, owing, among other reasons, to the doctrine of unity of persons between husband and wife.[1] But this does not apply to persons subject to the Indian Succession Act (X of 1865),[2] nor is it known to Hindu or Mahomedan law. Married women.

According to English law, it is a legal presumption (possibly it may be called a legal fiction) that a married woman is subject to the influence of her husband, and therefore she cannot be allowed to execute the trust without his concurrence.[3]

An insolvent may be a trustee. The property of an insolvent, and such property as he may acquire before he obtains his discharge, vests in the Official Assignee,[4] but not estates vested in him as trustee. These are unaffected by the insolvency,[5] and although the trust-property may be changed, it will not vest if it can be traced, as where it exists in the shape of bills or notes,[6] or any other substituted form,[7] for the assignees of a defaulting trustee have no better right than the trustee.[8] But where the trust-property had become mixed with the bankrupt's general property, and could not be distinguished, it was held that the assignees would take it, and that the *cestui que trust* must prove.[9] Insolvent.

[1] Smith *v.* Smith, 21 Beav., 385; Drummond *v.* Tracy, 1 Johns., 608; Lake *v.* De Lambert, 4 Ves., 593; *Re* Kaye, L. R., 1 Ch., 387.

[2] See *ante*, p. 125.

[3] Avery *v.* Griffin, L. R., 6 Eq., 606; Lloyd *v.* Pughe, L. R., 8 Ch., 88; Wainford *v.* Heyl, L. R., 20 Eq., 321. See further, Lewin, 7th Ed., 32.

[4] 11 and 12 Vict., C. 21, s. 7.

[5] See Houghton *v.* Kœnig, 18 C. B., 235; Winch *v.* Keeley, 1 T. R., 619.

[6] *Ex parte* Dumas, 2 Ves., 582.

[7] Frith *v.* Cartland, 2 H. and M., 417.

[8] *Ibid.* [9] *Ex parte* Dumas, 1 Atk., 234.

LECTURE V.

The possession of a trustee is not a possession with the consent of the true owner under the reputed ownership clause, s. 23 of the Insolvent Act.[1]

Cestuis que trustent.

Cestuis que trustent are not, as such, incapacitated from being trustees for themselves and others, but, as a general rule, they are not altogether fit persons for the office, in consequence of the probability of a conflict between their interest and their duty.[2] Where the trusts are onerous, and other persons cannot be found to undertake them, the Court will appoint a *cestui que trust* to be a trustee.[3]

Relatives.

It is not advisable to appoint relatives to be trustees. The worst breaches of trust are committed by relatives, who are unable to resist the importunities of their *cestuis que trustent* when they are nearly related to them.[4]

Number of trustees.

An adequate number of trustees should be appointed. There are strong reasons against allowing trust property to remain in the hands of one trustee. He has the absolute control over it, and if tempted to commit a breach of trust, he can do so with less fear of detection than if there are co-trustees. When one of several trustees dies, steps should be at once taken to provide a successor. The safe rule, where money is concerned, is to appoint at least three trustees and to keep the number full.[5]

Disclaimer.

No one is bound to accept a trust, and therefore any person who has been appointed a trustee may, if he has not acted in the office, disclaim.[6] If, however, he has exercised any acts of ownership, he cannot disclaim.[7] "Though," said Lord Redesdale,[8] "a person may have agreed in the lifetime of a testator to accept the executorship, he is still at liberty to recede except so far as his feelings may forbid it; and it will be proper for him to do so, if he finds that his charge as executor is different from what he has conceived it to be when he entered into the engagement."

According to English law, the heir of a trustee cannot disclaim, the reason being that the legal estate, if

[1] 11 and 12 Vict., c. 21. And see *Ex parte* Martin, 19 Ves., 491.

[2] Forster *v.* Abraham, L. R., 17 Eq., 351; Passingham *v.* Sherborn, 9 Beav., 424; Barnes *v.* Addy, L. R., 9 Ch., 244.

[3] *Ex parte* Clutton, 9 Jur., 988.

[4] Wilding *v.* Bolder, 21 Beav., 222. [5] See Lewin, 7th Edn., 39.

[6] Robinson *v.* Pett, 3 P. Wms., 251; Moyle *v.* Moyle, 2 R. and M., 710; Lowry *v.* Fulton, 9 Sim., 123.

[7] Bence *v.* Gilpin, L. R., 3 Ex., 76: and see *ante*, p. 120.

[8] Doyle *v.* Blake, 2 Sch. and Lef., 239.

the disclaimer were allowed, would vest in the Crown.[1] I do not know of any authority on this point as regards estates in India. But as it has been decided that the English rules of succession to immoveable property apply to the descent of estates in land held by European British subjects,[2] probably it would be held that the heirs of a European British subject could not disclaim. As regards other British subjects, the distinction between legal and equitable estates does not exist, and the rules of inheritance are different, and therefore it would seem that the heir of such last named subject may disclaim.

Delay.

The disclaimer should be made without delay, as otherwise a question may arise as to whether there has not been an acceptance by acquiescence. This question is of course in every case one of fact to be decided from the circumstances of the case.[3]

How made.

The disclaimer may be by parol, but it is more prudent that it should be by writing, as there is less fear of ambiguity.[4] The instrument should be a disclaimer, and not a conveyance, though, if the intention to disclaim is apparent on the conveyance, that will be sufficient.[5] A trustee may disclaim in Court[6] or by his written statement.[7] And if notwithstanding he is continued as a party to the hearing, he will be entitled to his costs as between party and party.[8] And there may be conduct which amounts to a clear disclaimer.[9]

Gift to trustee or executor.

A trustee or executor to whom a bequest is given, may take the gift and disclaim the office,[10] unless acting in the office is a condition attached to the gift.[11]

[1] Lewin, 7th Edn., 180.

[2] See Gardiner *v.* Fell, 1 Moo. I. A., 299; Freeman *v.* Fairlie, *ib.*, 305; Mayor of Lyons *v.* The East India Co., *ib.*, 175; Sarkies *v.* S. M. Prosonnomoyee Dossee, I. L. R., 6 Calc., 794.

[3] See Doe *v.* Harris, 16 M. &. W., 517; Noble *v.* Meymott, 14 Beav., 471; Paddon *v.* Richardson, 7 D. M. G., 563; James *v.* Frearson, 1 Y. and C. C. C., 370.

[4] See Townson *v.* Tickell, 3 B. and Ald., 31; 1 Stacey *v.* Elph, 1 M. and K., 199.

[5] Nicholson *v.* Wordsworth, 2 Swanst., 372; Urch *v.* Walker, 3 My. and Cr., 702.

[6] *In re* Ellison's Trust, 2 Jur. (N. S.), 62; Foster *v.* Dawber, 1 Dr. and Sm., 172.

[7] Norway *v.* Norway, 2 M. and K., 278. [8] Bray *v.* West, 9 Sim., 429.

[9] Stacey *v.* Elph, 1 M. and K., 199.

[10] Talbot *v.* Radnor, 3 M. and K., 251; Pollexfen *v.* Moore, 3 Atk., 272; Andrew *v.* Trinity Hall, 9 Ves., 525.

[11] Warren *v.* Rudall, 1 J. and H., 1; Slaney *v.* Watney, L. R., 2 Eq., 418; Lewis *v.* Matthews, L. R., 8 Eq., 277.

LECTURE V.

A trustee or executor who has disclaimed may afterwards act as agent for the other trustees or executors. He should, however, be careful to disclaim clearly, as otherwise he may be considered to have accepted by acquiescence.[1]

If one of two co-trustees disclaims, the trust-property is vested in the other, and he becomes sole trustee *ab initio*.[2]

A person named as trustee without his sanction, and called on to disclaim, is authorized in taking the opinion of counsel as to his obligation to execute a disclaimer.[3]

[1] See cases referred to, *ante*, p. 120.
[2] Pepperoorn *v.* Wayman, 5 DeG. and Sm., 230.
[3] See *Re* Tryon, 7 Beav., 496.

LECTURE VI.

DUTIES AND LIABILITIES OF TRUSTEES.

Duties and liabilities of trustee — Trustee to acquaint himself of state of property — Trustee bound to protect trust-property — Getting in trust-estate — Estate outstanding on personal security — When securities to be realized — Care required from trustee — Loss occasioned by agent — By act of co-trustee — Trust-fund consisting of money — Control of trust-fund — Failure of banker — Trustee to prevent waste — Permissive waste — *Cestui que trust* may not benefit by waste — Tenants-for-life without impeachment of waste — When Court may interfere — Principle on which Court acts — Waste by Hindu widow — Suit for possession — Receiver — Alienation by widow — Proper parties to sue — Collusion by immediate reversioner — Conversion of perishable property — Howe *v.* Earl of Dartmouth — Pickering *v.* Pickering — Exceptions from rule — Trustee to be impartial — Discretion of trustees not interfered with — Selecting objects of the trust — Modes of investment — Exercise of power by will — Trustee cannot set up title to trust-property — Claim by third person — Delivery up of moveable property — Failure of *cestui que trust* — Trustee to keep accounts — Vouchers — Costs — Good faith — Managing member of Hindu family — Duties of trustee as to investment — Personal security — Shares in companies — Where personal security allowed — One *cestui que trust* not to be benefited at expense of others — Consent of *cestuis que trustent* to change — Continuing investment — Varying securities — Investment or mortgage — Trustees may not lend to themselves — Paying over mortgage-money — Consent of Court to investment — Trustees' and Mortgagees' Powers Acts — Official Trustee's Act of 1864, s. 14 — Remedy in case of non-investment — Remedy in case of wrongful investment — Insolvency of trustee — Duties of trustees for sale or mortgage — Trustee bound to sell to best advantage — Must attend to interest of all parties — Valuation — Absolute trust for sale will not authorize mortgage — Trust to mortgage will not authorize sale — Trust for sale survives — Trustees bound to make good title — Counsel's opinion — Payment of purchase-money — Duties of trustees for purchase.

Duties and liabilities of trustee.

WE have now to consider what are the duties and liabilities incurred by a trustee after he has accepted. On this point Mr. Lewin says:[1] "As soon as a trustee has accepted the office, he must bear in mind that he is not to sleep upon it, but is required to take an *active* part in the execution of the trust. The law knows no such person as a *passive* trustee. If, therefore, an unprofessional person

[1] 7th Edn., 190.

LECTURE VI.

be associated in the trust with a professional one, he must not argue, as is often done, that because the solicitor is better acquainted with business and with legal technicalities, the administration of the trust may be safely confided to him, and that the other need not interfere except by joining in what are called formal acts. If he sign a power-of-attorney for sale of stock, or execute a deed of reconveyance on repayment of a mortgage sum, he is as answerable for the money as if he were himself the solicitor, and had the sole management of the transaction."

And Mr. Spence says:[1] "Every person who accepts a trust is bound to execute it[2] with fidelity, and with reasonable diligence; it is no excuse to say that he had no benefit from it, but that it was merely honorary: the Court of Chancery looks upon all trusts as honorary, and as a burthen upon the honour and conscience of the party intrusted; and for the execution of which he is even precluded from receiving or making any benefit or advantage whatsoever."

Trustee to acquaint himself of state of property.

A trustee is bound to acquaint himself with the nature and particular circumstances of the trust-property. But a new trustee is not liable for any breach of trust committed by his predecessor. He is entitled to assume that everything before his coming in had been duly performed, and he cannot be charged with wilful default, because he did not look back and inquire whether the former trustees had performed their duties up to that time.[3]

If, however, he does not enquire into the state of the trust fund, and does not take steps to get in any part which may be outstanding on improper security, he will be liable for the consequences of his neglect, like any executor who knows that a debt is due to his testator's estate and omits to get it in.[4] Where a marriage settlement contained a covenant on the part of the husband to settle after acquired property, it was held that a new trustee was not liable for not having inquired as to whether any such settlement had been made, there being nothing to lead to a suspicion that any default had been made by

[1] 2 Sp. Eq. Jur., 918.
[2] Charitable Corporation *v.* Sutton, 2 Atk., 406.
[3] *Ex parte* Graves, 25 L. J. Bkcy., 53.
[4] Taylor *v.* Millington, 4 Jur. (N. S.), 204; James *v.* Frearson, 1 Y. and C. C. C., 370; *Ex parte* Graves, 25 L. J. Bkcy., 53; Yode *v.* Cloud, L. R., 18 Eq., 634.

the old trustees or the covenantor.[1] A trustee of chattels, personal, settled for the separate use of a married woman should take care that an inventory is made, otherwise he may be deprived of his costs.[2]

Trustee bound to protect trust-property.

The office of a trustee is to a certain extent onerous. We have seen[3] that the law does not recognize a passive trustee, but that he must take an active part in the execution of the trust. It is one of his primary duties to maintain and defend all such actions as are requisite for the assertion or protection of the title to the trust-property.[4] And as a general rule, trustees are bound to press on all the remedies for the recovery of debts due to the trust-estate; and if any securities seem proper to be continued, it seems the only safe course for trustees to adopt, is to submit the point to the judgment of the Court,—not to decide upon it themselves, unless a discretionary power to that extent be expressly or by clear implication given to them: else they will be answerable for any loss that may ensue in consequence of their misplaced confidence, however good may have been their intention.[5]

Power has been given to trustees in India to sue for the possession of specific moveable property to the beneficial interest in which the person for whom they are trustees is entitled. Possession is to be recovered in the manner prescribed by the Code of Civil Procedure.[6]

Getting in trust-estate.

Trustees are bound to place the trust-property in safe securities, and will be liable for loss if they delay in getting it in and investing it.[7] For instance, if debts are outstanding, it is the duty of the trustees to get them in as soon as possible; and if in consequence of their negligence the debts are lost by the debtor's insolvency, or if the right to sue is barred by limitation, they will be personally liable.[8]

So, if a man covenants to settle a certain sum within a given period, and the trustees execute the trust-deed

[1] Graves *v.* Strahan, 8 D. M. G., 291.
[2] England *v.* Downs, 6 Beav., 279.
[3] *Ante*, p. 134.
[4] Goode *v.* Burton, 11 Jur., 851.
[5] Gaskell *v.* Harman, 11 Ves., 489; Lowson *v.* Copeland, 2 Bro. C. C., 157; Tebbs *v.* Carpenter, 1 Madd., 298.
[6] See Act I of 1877, s. 10.
[7] See DeSouza *v.* DeSouza, 12 Bom., 190.
[8] Caffrey *v.* Darby, 6 Ves., 488; Jones *v.* Higgins, L. R., 2 Eq., 538; *Ex parte* Ogle, L. R., 8 Ch., 711; Rowley *v.* Adams, 2 H. L. C., 725; Stone *v.* Stone, L. R., 5 Ch., 74.

LECTURE VI.

and sign a receipt for the money, they will be liable.[1] There is no objection to trustees receiving money before the date on which it is payable, if the debtor chooses to pay it.[2]

Trustees may fairly allow a debt to be paid by instalments, but they will not be justified in granting any great indulgence.[3] In the exercise of a fair discretion they need not commence legal proceedings unnecessarily, but they should exert themselves to get in the debt, and, if necessary, commence compulsory proceedings to obtain it.[4]

When trustees *bonâ fide* exert themselves to discharge their duty, and merely commit an error in judgment, unless there is a plain violation of trust, they will not be visited severely. The fair exercise of their judgment is a protection to them, although the consequences may be bad.[5]

Estate outstanding on personal security.

If part of a testator's estate is outstanding on personal security, it is the duty of the executors to take steps to get it in,[6] even though the debtor is a co-executor.[7]

The fact that the testator approved of the security and had continued it for many years, and that it was good at the time of his death, will not relieve the executors from responsibility in case of loss.[8] Personal security changes from day to day by reason of the personal responsibility of the party giving the security, and as a testator's means of judging of the value of that responsibility are put an end to by his death, the executor who has omitted to get it in within a reasonable time, becomes himself the security.[9] An application to the debtor must be followed up by legal proceedings if not attended to; a mere demand through an attorney will not discharge the executor.[10]

But executors will not be liable for not taking legal proceedings if it appears that the proceedings would have

[1] Lewin, 7th Ed., 265.
[2] Mills *v.* Osborne, 7 Sim., 30.
[3] Caffrey *v.* Darby, 6 Ves., 495.
[4] Caney *v.* Bond, 6 Beav., 486.
[5] Garrett *v.* Noble, 6 Sim., 516.
[6] Lowson *v.* Copeland, 2 Bro. C. C., 156; Bailey *v.* Gould, 4 Y. and C., Ex., 221; Attorney-General *v.* Higham, 2 Y. and C. C C., 634.
[7] Styles *v.* Guy, 1 Mac. and G., 422; Egbert *v.* Butter, 21 Beav., 560; Candler *v.* Tillett, 22 Beav., 257.
[8] Powell *v.* Evans, 5 Ves., 839; Tebbs *v.* Carpenter, 1 Madd., 290; Clough *v.* Bond, 3 M. & Cr., 496; Bullock *v.* Wheatley, 1 Coll., 130.
Bailey *v.* Gould, 4 Y. & C., Ex., 226, *per* Alderson, B.
[10] Lowson *v.* Copeland, 2 Bro. C. C., 156.

been useless.[1] And if it appears that though the whole debt could not have been recovered, a part might, they will only be liable for what might have been recovered.[2] LECTURE VI.

A direction in the will that the executors shall call in securities not approved by them, will not discharge them from liability for loss arising from the failure of personal security. Such a direction must be considered as referable to securities upon which a testator's property might, from their nature, be invested, and not as authorizing a kind of investment which a Court of Equity will not sanction.[3]

And if a settlement contain a clause that the trustees are to get in the money, "whenever they shall think fit and expedient so to do," they will be liable if they refrain from enforcing payment out of tenderness to the tenant-for-life, without due regard to the interests of all the *cestuis que trustent*.[4]

When securities to be realized.

If the testator's property is outstanding on securities which may reasonably be considered as safe, the executors are not bound to call them in, until the creditors call for payment of their debts; or unless they have reason to suspect the solvency of the debtor. "What," said Lord Thurlow,[5] "is the executor to do. Is he to call in the securities before creditors require payment of their debts? Must the money lie dead without interest, or must he put it out on fresh securities? On the original securities he had the testator's confidence for his sanction; but on any new securities it will be at his own peril."[6] The trustees, however, should enquire whether the securities are safe, and call them in if they are not.[7]

In all suits concerning property vested in a trustee, executor, or administrator, when the connection is between the persons beneficially interested in such property and a third person, the trustee, executor, or administrator represents the persons so interested, and it is not ordinarily necessary to make them parties to the suit; but the Court may,

[1] Clack *v.* Holland, 19 Beav., 262; Hobday *v.* Peters (No. 2), 603; Walker *v.* Symonds, 3 Swanst., 71.

[2] Maitland *v.* Bateman, 16 Sim., 233 (*n*).

[3] Styles *v.* Guy, 1 Mac. & G., 428, *per* Lord Cottenham.

[4] Lewin, 7th Edn., 268, citing Luther *v.* Bianconi, 10 Ir. Ch., 194.

[5] Orr *v.* Newton, 2 Cox, 276.

[6] And see Howe *v* The Earl of Dartmouth, 7 Ves., 150.

[7] Ames *v.* Parkinson, 7 Beav., 384; Harrison *v.* Thexton 4 Jur., N. S., 550. As to trustees' receipts, see Lewin, 7th Ed., 268.

LECTURE VI

if it thinks fit, order them, or any of them, to be made parties.[1]

Care required from trustee.

A trustee is bound to take the same care of the trust-property as he would of his own, but not more care;[2] and if he has taken such care, he will not be liable for loss, destruction, or deterioration of the trust-property. Thus, a trustee was held not to be liable when the trust-property was stolen from his house, together with property of his own.[3] So, where the defendant, an administratrix, had handed over certain goods to her solicitor, from whose custody they were stolen, it was held that she should not be charged.[4] Where, however, the loss is occasioned by the act of a person employed by the trustee, the trustee will have to bear the loss;[5] as where the loss is caused by his solicitor, having committed a fraud on the occasion of the investment of the fund on mortgage.[6]

Loss occasioned by agent.

By act of co-trustee.

Where the trust-property consists of securities or articles which pass by delivery, and there are several trustees, the property should be deposited with the bankers of the trustees; and if it is so deposited, and the bankers, without the privity or concurrence of the co-trustees, allow one of the trustees to have access to the property, and he makes away with it, the co-trustees remaining ignorant of the fact are not liable to make good any portion of the property misappropriated.[7] An executor is not bound to insure, or continue the insurance of, his testator's property against fire.[8]

Trust-fund consisting of money.

Where the trust-fund consists of money, the trustee, pending investment, may place the money in the hands of a banker.[9] The trustee should open a separate account in the name of the trust-estate, and should not mix the trust-fund with his own money. If he does so, he will be

[1] Act X of 1877, s. 437, as amended by Act XII of 1879, s. 72.

[2] Morley *v.* Morley, 2 Ch. Cas., 2; Jones *v.* Lewis, 2 Ves., 240; Attorney-General *v.* Dixie, 13 Ves., 534; Massey *v.* Banner, 1 Jac. & W., 247.

[3] Morley *v.* Morley, 2 Ch. Cas., 2.

[4] Jones *v.* Lewis, 2 Ves., 240.

[5] Bostock *v.* Floyer, L. R., 1 Eq., 28.

[6] Sutton *v.* Wilders, L. R., 12 Eq., 373.

[7] Mendes *v.* Guedalla, 2 Johns. & H., 259.

[8] Bailey *v.* Gould, 4 Y. & C., Ex., 221; Dobson *v.* Land, 8 Hare, 216; Fry *v.* Fry, 27 Beav., 146.

[9] Routh *v.* Howall, 3 Ves., 565; Jones *v.* Lewis, 2 Ves., 241; Adams *v.* Claxton, 6 Ves., 226.

liable in case the banker fails.[1] And a trustee will be liable for loss, if he allows a person to draw upon the trust-property in the bank, and such person misappropriates the money.[2] And he will be liable for the failure of a banker,[3] or broker,[4] if the money ought to have been invested or otherwise dealt with, and not left in the banker's or broker's hands: and the usual indemnity-clause will not in such cases protect the trustee.[5]

Control of trust-fund.

The trustee must be careful not to put the trust-fund out of his control and under the control of other persons. If he does so, he guarantees the solvency of those persons, and will be answerable for any loss that may ensue;[6] and the liability will be the same, although the persons under whose control the property was left were co-trustees.[7]

In a case before Sir A. Hart, in Ireland, an executor was held to be justified, though he had placed the assets in a bank so as to be under the control of the co-executor. The money was entered in the books to the joint account of the co-executors, but the bank was in the habit of answering the cheques of either co-executor singly. "It is the custom of bankers," said Lord Chancellor Hart, "that what is deposited by one to the joint account may be withdrawn by the cheque of the other; and for convenience of business, it is necessary this risk should be incurred, for it would be very hard to transact business if every cheque should be signed by all the executors." However, his Lordship admitted, that "if there were any fraud or collusion, wilful default or gross neglect, or if the executor had any reason to put a stop to the mismanagement by the co-executor, the case would be altered."[8] "But," says Mr. Lewin, "even with this qualification the doctrine is so contrary to the principle of other cases, that no trustee or executor could be advised to rely upon it in practice."

[1] Wilks *v.* Groom, 3 Drew., 584; Johnson *v.* Newton, 11 Hare, 160; Swinfen *v.* Swinfen (No. 5), 29 Beav., 211; Pennell *v.* Deffell, 4 D. M. G., 386; *Ex parte* Kingston, L. R., 6 Ch., 632: and see *In re* Hallett's Estate, Knatchbull *v* Hallett, L. R., 13 Ch. Div., 696.

[2] Ingle *v.* Partridge, 32 Beav., 661; Evans *v.* Bear, L. R., 10 Ch., 76; Ferguson *v.* Ferguson, *ib*, 661.

[3] Challen *v.* Shippam, 4 Hare, 555; Swinfen *v.* Swinfen, 29 Beav., 211; Rehden *v.* Wesley, *ib.*, 213.

[4] Mathews *v.* Brise, 6 Beav., 239.

[5] Rehden *v.* Wesley, 29 Beav., 213.

[6] Salway *v.* Salway, 2 R. & M., 218; affd., *nom.* White *v.* Baugh, *ib.*, 220.

[7] Lewis *v.* Nobbs, L. R., 8 Ch. Div., 591.

[8] Lewin, 7th Ed., 292, citing Kilbee *v.* Sneyd, 2 Moll., 186.

LECTURE VI.

Failure of banker.

Trustees will be liable for loss incurred by the failure of bankers, if it was their duty to have invested the trust-moneys,[1] or to have paid them over to new trustees,[2] or into Court.[3]

An investment with the bankers themselves upon the security of their notes-of-hand is not sufficient, for that is merely a personal security.[4]

But executors require a certain amount of ready-money to enable them to wind up their testator's estate, and are entitled to keep such a sum uninvested at their bankers, and will not be made liable if it is lost within the year allowed for satisfying claims.[5]

Where executors drew trust-funds out of one bank, and invested them on a deposit account at interest in another bank, such an investment not being authorized by the will, they were held to be personally liable, notwithstanding a clause in the will indemnifying them against losses by a banker of money deposited for safe custody.[6]

It is a grave breach of duty in trustees or administrators taking out letters of administration to estates in this country, under powers-of-attorney from executors or next-of-kin abroad, to mix the incomes raised by them from trust-properties, or the funds of the estate, in one common fund with their own moneys, and such a course of dealing may expose the trustees or administrators to criminal as well as civil liabilities.[7]

Trustee to prevent waste.

Where a trust is created for several persons in succession, as where property is devised to trustees, upon trust, to permit *A* to enjoy the rents and profits for his life, and after his death an interest in the property is given to *B*, and the person having the life-estate commits, or threatens to commit, any act which is destructive or permanently injurious to the trust-estate, such as cutting down timber or destroying houses, the trustees ought to sue for an injunction to restrain the tenants-for-life from committing the acts of waste. "There can be no doubt," said Lord Lang-

[1] Moyle *v.* Moyle, 2 R. & M., 710; Johnson *v.* Newton, 11 Hare, 160.
[2] Lunham *v.* Blundell, 4 Jur., N. S., 3.
[3] Wilkinson *v.* Bewick, 4 Jur., N. S., 1010.
[4] Darke *v.* Martyn, 1 Beav., 525.
[5] Johnson *v.* Newton, 11 Hare, 160; Swinfen *v.* Swinfen (No. 5), 29 Beav., 211.
[6] Rehden *v.* Wesley, 29 Beav., 213.
[7] *In re* Cowie, I. L. R., 6 Calc., 70: see Lewin, 7th Ed., 273, for the English authorities.

dale, "that it is the duty of the trustee to protect the property against the improper acts of the tenant-for-life."[1] And if the persons in remainder are unborn, or under disability, the trustees are bound to interfere.[2] This is the duty of the trustees, but if they do not interfere, the remainderman has a right to apply for the injunction.[3] So in the case of mortgages, if the mortgagor or mortgagee in possession commits waste, or threatens to commit it, an injunction will be granted.[4]

Permissive waste.

An injunction can only be obtained to prevent the commission of acts of active waste, not to restrain the tenant-for-life from allowing permissive waste, as by allowing the trust-property to fall into disrepair.[5] "I think," said Wood, V.C., "that it is not possible to obtain a remedy against permissive waste indirectly through the medium of a trust created in the property. If I were to hold that, it would be most inconvenient. If every trustee is to be considered liable, though merely a trustee under a will, which devises the property to and to his use, as in *Denton* v. *Denton*,[6] in cases of permissive waste for want of repairs, the difficulty which is now felt of getting respectable persons to act as trustees would be increased. I can foresee no end to the demands which would be made upon trustees by remaindermen coming into possession of the trust-property, who might think it not sufficiently repaired, if they might say to the trustees 'it was your duty to look after the tenant-for-life, you had the legal estate, and it was your business to see that he was performing all these trusts; and as you have not done so, we shall fix you with the liability.' I think that such a doctrine cannot possibly be established."[7] On appeal,[8] the decision of Wood, V.C., was affirmed, Lord Cottenham, L.C., saying: "It was argued, independently of the trust, that it is the duty of a tenant-for-life to repair. '*Equitas sequitur legem.*' But even legal liability now is very doubtful.[9] Whatever be the legal

[1] Pugh *v* Vaughan, 12 Beav., 517, 520. See also Denton *v.* Denton, 7 Beav., 388; Powys *v.* Blagrave, Kay, 495; 4 D. M. G., 448.
[2] Powys *v.* Blagrave, Kay, 495; 4 D. M G., 448.
[3] Perrot *v.* Perrot, 3 Atk., 94; Viner *v.* Vaughan, 2 Beav., 469.
[4] Robinson *v.* Litton, 3 Atk., 485; Garth *v.* Cotton, 1 Dick., 183; 1 Ves., 524, 546; Stansfield *v.* Habergham, 10 Ves., 277.
[5] Denton *v.* Denton, 7 Beav., 388; Pugh *v.* Vaughan, 12 Beav., 517.
[6] 7 Beav., 388. [7] Powys *v.* Blagrave, Kay, 495, 506.
[8] 4 D. M. G., 448.
[9] Gibson *v.* Wells, 1 N. R., 291; Horne *v.* Benbow, 4 Taunt., 764.

LECTURE VI.

liability, this Court has always declined to interfere against mere permissive waste. *Lord Castlemain* v. *Lord Craven*;[1] there the Master of the Rolls said, 'the Court never interposes in case of permissive waste either to prohibit or to give satisfaction, as it does in case of wilful waste.' On this ground relief was refused in *Wood* v. *Gaynon*.[2] In that case a tenant-for-life had been guilty of permissive waste, and the plaintiff and one of the defendants, Benjamin Lyme, were the reversioners; Lyme refused to join with the plaintiff in an action at law. The Master of the Rolls refused to assist the plaintiff, saying that as there was no precedent he would not make one; adopting the argument, that it would tend to harass tenants-for-life and jointresses, and that suits of this kind would be attended with great expense in depositions about the repairs. With respect to the case of *Caldwall* v. *Baylis*,[3] it does not sustain the doctrine for which it was cited. The case of *Re Skingley*[4] was founded on the express obligation of the lunatic to repair. I do not refer to the cases where the question has been as to the right to charge assets. There the decisions have rested on other grounds. There is no precedent for what is asked in this respect. I certainly will not be the first to make one."

Cestui que trust may not benefit by waste.

If the person in possession of the trust-estate, the tenant-for-life, commits active waste, he will not be permitted to derive any benefit from his wrongful act, but the money arising therefrom will be preserved for the remainder-men.[5] If, however, the tenant-for-life has expended money in permanent improvements on the trust-estate, he will be allowed credit for such sums.[6]

Tenants-for-life without impeachment of waste.

If the *cestui que trust* is tenant-for-life without impeachment of waste,—that is to say, if the instrument creating the trust declares that the tenant-for-life shall not be punishable for waste, or the *cestui que trust* is tenant-in-tail after possibility of issue extinct, which is the case where an estate is limited to a man and the heirs of his body by a particular wife, and she dies without having had children, or none of her children are living at her death, the *cestui que trust* may commit ordinary waste.

[1] 22 Vin. Abr., 523, tit. 'Waste,' pl., 11.
[2] Amb., 395. [3] 2 Mer., 408. [4] 3 Mac. and G., 221.
[5] Garth *v.* Cotton, 2 Ves., 524; 1 Dick., 183; Williams *v.* Duke of Bolton, 3 P. Wms., 268 (*n*); Seagram *v.* Knight, L. R., 2 Ch., 628.
[6] Birch Wolfe *v.* Birch, L. R., 9 Eq., 683.

But he will be restrained from committing what is known as 'equitable waste,' by felling timber planted or left standing for the shelter or ornament of the family mansion-house or grounds.[1]

When Court may interfere.

It is not necessary, in order to give the Court ground for interfering, that the plaintiff, whether trustee or remainder-man, should wait until a serious act of waste has been committed;[2] but the Court will interfere if a fair case of prospective injury has been made out.[3] The mere apprehension or belief that waste will be committed is not sufficient;[4] but if an intention to commit waste can be shown to exist, or if a man insists on his right, or threatens to commit waste, there is a foundation for the exercise of the jurisdiction.[5]

If the act of waste is trivial, the Court will not interfere, unless it appears that further waste is intended or threatened.[6]

In order to obtain the assistance of the Court, it is only necessary to prove that a single act of waste, whether legal or equitable, has been committed.[7]

Principle on which Court acts.

The broad principle upon which a Court administering equity acts in restraining a person, who has only a limited interest in property of which he is in possession, from destroying or injuring such property, is, that of protecting property from irreparable injury, and to prevent a malicious, wanton, and capricious abuse of their rights and authorities, by persons having but a temporary and limited interest in the subject-matter. By irreparable injury is meant, not such injury as cannot by any possibility be repaired, but serious and material injury, which cannot be adequately compensated for by pecuniary damages.[8]

Waste by Hindu widow.

Acting upon principles in some respects analogous to those upon which the Court of Equity in England act in

[1] See Garth *v.* Cotton, 1 Ves., 524, 546; 1 Dick., 183, and the notes to that case, 1 Wh. and T. L. C., 4th Edn., pp. 697, 750.

[2] Gibson *v.* Smith, 2 Atk., 182; Coffin *v.* Coffin, Jac., 71.

[3] Tipping *v.* Eckersley, 2 K. and J., 264; Elliott *v.* North-Eastern R. C., 1 J. and H., 145; 2 D. F. and J., 423; 10 H. L., 333; Hext *v.* Gill, L. R., 7 Ch., 700.

[4] Hanson *v.* Gardiner, 7 Ves., 307; Potts *v.* Potts, 3 L. J., Ch., 176; Campbell *v.* Allgood, 17 Beav., 623.

[5] See cases cited in the preceding notes.

[6] Brace *v.* Taylor, 2 Atk., 253; Barry *v.* Barry, 1 J. and W., 653; Lambert *v.* Lambert, 2 Ir. Eq., 210; Coffin *v.* Coffin, Jac., 71.

[7] Coffin *v.* Coffin, 6 Madd., 17.

[8] See Kerr on Injunctions, Ch. III, s. 1.

LECTURE VI.

restraining a tenant-for-life from committing waste, the Courts of this country have, in many instances, restrained a Hindu widow from acts injurious to the property which she has inherited from her husband.[1] "Such acts," says Mr. Mayne,[2] "are of two classes:—*first*, those which diminish the value of the estate; *second*, those which endanger the title of those next in succession. *First*, under this head come all acts which answer to the description of waste,—that is, an improper destruction or deterioration of the property. The right of those next in reversion to bring a suit to restrain such waste, was established apparently for the first time by an elaborate judgment of Sir L. Peel, in 1851, in *Hurrydass Dutt* v. *Rungunmoney*. What will amount to waste has never been discussed. Probably no assistance upon this point could be obtained from an examination of the English cases in regard to tenants-for-life. The female heir is, for all purposes of beneficial enjoyment, full and complete owner. She would, as I conceive, have a full right to cut timber, open mines, and the like, provided she did so for the purpose of enjoying the estate, and not of injuring the reversion. As Sir L. Peel said: 'The Hindu female is rather in the position of an heir taking by descent until a contingency happens, than an heir or devisee upon a trust by implication. Therefore, a bill filed by the presumptive heir in succession against the immediate heir who has succeeded by inheritance, must show a case approaching to spoliation.'" "It is necessary," said the Right Hon. T. Pemberton Leigh,[3] "to show that there is danger to the property from the mode in which the party in possession is dealing with it, in which case, and in such case only, the Court will interfere."[4]

Suit for possession.

If the widow has committed an act involving forfeiture of property, the reversioners will be entitled to immediate possession.[5] A suit will lie for possession with a view to the prevention of waste, either inchoate or threatened, though of course evidence of such a nature must be procured as will convince the Court that, but for its interference,

[1] See Nundlal Baboo *v.* Bolakee Bebee, S. D. A. of 1854, p. 351.
[2] Hindu Law and Usage, 2nd Ed., § 555.
[3] Hurry Doss Dutt *v.* S. M. Uppoornah Dossee, 6 Moo. I. A., 446.
[4] See also Bindoo Bassinee Dossee *v.* Boliechand Sett, 1 W. R., 125; Grose *v.* Amirtamayi Dassi, 4 B. L. R., O. C., 1.
[5] M. S. Kishnee *v.* Khealee Ram, 2 N. W. P., 424.

ultimate loss to the heirs by succession will ensue.[1] The ground for removing the widow from the management of the property in these cases is, that she has proved herself to be unworthy of the confidence reposed in her.[2]

LECTURE VI.

When it is shown that ultimate loss to the estate will result from the acts of the widow, the Court will appoint a receiver, who may be the reversionary heir. His appointment as such is not by virtue of his reversionary right, but on a consideration of what is most for the benefit of the estate.[3]

Receiver.

Although the widow may be removed from the management of the property, she will remain entitled to the rents and profits, which must be paid to her by the receiver. It is not competent to the Court to put the reversioner into possession assigning maintenance to the widow.[4]

Where a widow gave up possession of property upon a claim being made to it, and refused to have anything to do with it,—it was held, that the reversioners were entitled to sue the widow and the person to whom she had given up possession for a declaration of their title, and that the proper course for the Court to adopt was, to appoint a manager to collect the assets of the estate, who should account for them to the Court, and the Court should hold them for the benefit of the reversionary heirs.[5]

If a widow has alienated the property, and it is in the hands of a third person, the reversionary heirs may sue the grantee to prevent waste or destruction of the property, whether moveable or immoveable.[6] But they will have no cause of action unless they charge waste or injury to the property which may affect their rights as reversioners.[7]

Alienation by widow.

[1] Goureekanth Dass *v.* Bhogobutty Dassee, S. D. A. of 1858, p. 1103; Goluk Monee Dassee *v.* Kishenpersad Kanoongoe, S. D. A. of 1859, p. 210.

[2] Nundlal Baboo *v.* Bolakee Bebee, S. D. A. of 1854, pp. 351, 366.

[3] Goluk Monee Dassee *v.* Kishenpersad Kanoongoe, S. D. A. of 1859, p. 210; M. S. Maharani *v.* Nand Lal Misser, 1 B L R., A. C., 27.

[4] Nundlal Baboo *v.* Bolakee Bebee, S. D. A. of 1854, pp. 351, 370; Golukmonee Dassee *v.* Kissenpershad Kanoongoe, S D. A. of 1859, p. 210; M. S. Lodhoomona Dassee *v.* Gunnesh Chunder Dutt, *ib.*, 436; M S. Maharani *v.* Nundalal Misser, 1 B. L. R., A. C., 27; Shama Soonduree v. Jumoona Chowdhrain, 24 W. R., 86.

[5] Radha Mohan Dhar *v.* Ram Das Dey, 3 B. L. R., 362.

[6] Gobindmani Dasi *v.* Sham Lal Bysak, B. L. R., F B. Rul, 48; Kamavadhani Venkata Subbaiya *v.* Joysa Narasingappa, 2 Mad. H. C. R., 116.

[7] M. S. Suraj Bansi Kunwar *v* Mahipat Sing, 7 B. L. R., 669.

LECTURE VI.

Proper parties to sue.

The proper persons to sue to restrain a widow from committing acts of waste are the immediate reversionary heirs.[1]

In *Bama Soonduree Dossee* v. *Bama Soonduree Dossee*[2] it was held, that persons whose rights are only inchoate and remote cannot bring such a suit. But, according to the later decisions, it seems that contingent reversioners may sue. In the recent case of *Chottoo Misser* v. *Jemah Misser*,[3] Garth, C. J., said: "It appears to me that this is one of that class of cases which are referred to in the *Shivagunga case*[4] as being exceptions to the general rule, which is there laid down. In page 191 of the judgment their Lordships allude to suits brought against Hindu widows by presumptive reversioners to restrain waste and the like, as being 'suits of a very special class, which have been entertained by the Courts *ex necessitate rei.*' They expressly say that, in such cases, the reversioner cannot get a declaration of his own title as against third persons; but he is permitted to sue as the presumptive heir, because, unless he were allowed to bring such a suit, there would be no means of preventing a widow from doing perhaps irremediable mischief to the estate. And suits like the present, it seems to me, come clearly within the principle of that exception."

Collusion by immediate reversioner.

And if the immediate reversioners are colluding with the widow, the contingent reversioners may sue to protect the estate.[5]

A stranger cannot sue, even with the consent of the heirs, or by making them parties;[6] nor can an assignee of a reversionary heir, even though he is the next reversionary heir to the husband after the assignor.[7]

Conversion of perishable property.

Where a trust is created for several persons in succession, as where there is a devise to one for life with remainder

[1] Raj Lukhee Dabea *v.* Gokool Chunder Chowdhry, 13 Moo. I. A., 209, 224; Kooer Golab Sing *v.* Rao Kurun Sing, 14 Moo. I. A, 176; Jumoona Dassya Chowdhrani *v.* Bama Soonderai Dassya Chowdhrani, L R., 3 I. A., 72; Gogun Chunder Sein *v* Joydoorga, S. D. A. of 1859, p. 626.

[2] 10 W R., 301.

[3] I. L. R, 6 Calc., 198.

[4] Kattama Natchiar *v.* Dorasinga Tever, L. R., 2 I. A., 169.

[5] Naikramlall *v.* Soorujbuns Sahee, S. D. A. of 1859, p. 891; Shama Soonduree Chowdhrain *v.* Jumoona Chowdhrain, 24 W. R., 86; Retoo Raj Pandey *v.* Lalljee Pandey, *ib.*, 399; Kooer Goolab Sing *v* Rao Kurun Singh, 14 Moo. I. A., 176, 193.

[6] Brojo Kishoree Dassee *v.* Sreenath Bose, 9 W. R., 463.

[7] Raicharan Pal *v.* Pyari Mani Dasi, 3 B. L. R., O. C., 70.

over,[1] and the subject-matter of the trust consists of property of a wasting description, such as leaseholds or long annuities, and no authority is expressly given to the trustees to convert, the Court assumes that it was the intention of the author of the trust that the trust-estate should be converted into property of a permanent character, otherwise the interest of the reversioners will run the risk of being damaged or destroyed; and it becomes the duty of the trustees, unless a contrary intention appears from the instrument creating the trust, to convert the property into property of a permanent nature,[2] and their omission to do so will be a breach of trust.[3] The doctrine will apply, though there are no trustees, but the bequest is made to the tenant-for-life directly.[4] The leading case on this point is *Howe* v. *Earl of Dartmouth*.[5] In that case a testator had bequeathed all his personal estate to his wife for life with remainders over; part of the property consisted of annuities; and it was held, that they ought to be converted, and the proceeds invested in Government securities. Lord Eldon said: "Unless the testator directs the mode, so that it is to continue as it was, the Court understands that it shall be put in such a state, that the others may enjoy it after the decease of the first, and the thing is quite equal, for the bequest might consist of a vast number of particulars; for instance, a personal annuity, not to commence in enjoyment till the expiration of twenty years from the death of the testator, payable upon a contingency perhaps. If in this case it is equitable that long or short annuities should be sold, to give everyone an equal chance, the Court acts equally as in the other case; for those future interests are, for the sake of the tenant-for-life to be converted into a present interest, being sold immediately in order to yield an immediate interest to the tenant-for-life. As in the one case, that in which the tenant-for-life has too great an interest is melted for the benefit of the rest; in the other, that of which, if it remained in specie, he might never receive anything, is brought in, and he has

Howe v. Earl of Dartmouth.

[1] See Lichfield v. Baker 2 Beav., 481; Crawley v. Crawley, 7 Sim., 427; Sutherland v. Cooke, 1 Coll., 498; Johnson v. Johnson, 2 Coll., 441; Fearns v. Young, 9 Ves., 549; Benn v. Dixon, 10 Sim., 636; Oakes v. Strachey, 13 Sim., 414; *Re* Shaw's Trust, L. R., 12 Eq., 124.

[2] See DeSouza v. DeSouza, 12 Bom., 189.

[3] Bate v. Hooper, 5 D. M. G., 338.

[4] House v. Way, 12 Jur., 958.

[5] 7 Ves., 137.

LECTURE VI.

Pickering v. Pickering.

immediately the interest of its present worth." In *Pickering* v. *Pickering*,[1] where the property consisted of leaseholds, Lord Cottenham said, p. 298: "Very nice distinctions have been taken, and must have been taken, in determining whether the tenant-for-life is to have the income of the property in the state in which it is at the time of the testator's death, or the income of the produce of the conversion of the property. The principle upon which all the cases on the subject turn is clear enough, although its application is not always very easy.

"All that *Howe* v. *Lord Dartmouth*[2] decided—and that was not the first decision to the same effect—is, that, where the residue or bulk of the property is left *en masse*, and it is given to several persons in succession as tenants-for-life and remaindermen, it is the duty of the Court to carry into effect the apparent intention of the testator. How is the apparent intention to be ascertained if the testator has given no particular directions? If, although he has given no directions at all, yet he has carved out parts of the property to be enjoyed in strict settlement by certain persons, it is evident that the property must be put in such a state as will allow of its being so enjoyed. That cannot be, unless it is taken out of a temporary fund and put into a permanent fund. But that is merely an inference from the mode in which the property is to be enjoyed, if no direction is given as to how the property is to be managed. It is equally clear that if a person gives certain property specifically to one person for life, with remainder over afterwards, then, although there is a danger that one object of his bounty will be defeated by the tenancy-for-life lasting as long as the property endures, yet there is a manifestation of intention which the Court cannot overlook. If a testator gives leasehold property to one for life, with remainder afterwards, he is the best judge whether the remainderman is to enjoy. The intention is the other way, so far as it is declared, and the terms of the gift, as a declaration of intention, preclude the Court from considering that he might have meant that it should be converted. Those two kinds of cases are free from difficulty, but other cases of very great difficulty may occur in which it may be very doubtful whether the testator has left property specifically,

[1] 4 My. & Cr., 289. [2] 7 Ves., 137.

but in which there are expressions which raise the question whether the property is not to be enjoyed specifically; for, as the Master of the Rolls appears to have observed in the present case, the word 'specific,' when used in speaking of cases of this sort, is not to be taken as used in its strictest sense, but as implying a question whether, upon the whole, the testator intended that the property should be enjoyed in specie. Those are questions of difficulty, because the Court has to find out what was the intention of the testator as to the mode of management and as to the mode of enjoyment."

The rule does not proceed upon the assumption that the testator intended his property to be sold, except so far as a testator may be presumed to intend that which the law will imply from the directions in his will. The rule proceeds upon this, that the testator has intended the enjoyment of perishable property by different persons in succession, and this can only be accomplished by means of a sale.[1]

Exceptions from rule.

The rule will not apply if the property is specifically given to persons in succession,[2] even though a discretionary power of changing the property is given to the trustees,[3] for such a power is given to them with a view to the security of the property, and not with a view to vary or affect the relative rights of the legatees, and indeed shows that the property was intended to be converted.[4] So, the rule will not apply if it clearly appears that the author of the trust intended the property to be enjoyed in specie.[5] "The question," said Lord Langdale,[6] "does not depend on the legacy being specific or not, but you are to collect from the will whether the testator intended that the property should at all events be enjoyed by those in remainder after the expiration of the prior interest."[7] If the property is not to be converted until a certain time has expired, the trustees will not be justified in converting it until that time arrives.[8]

If there is no indication in the will that the property

[1] Cafe *v.* Bent, 5 Hare, 34, *per* Wigram, V. C.
[2] DeSouza *v.* DeSouza, 12 Bom., 190.
[3] Lord *v.* Godfrey, 4 Madd., 455; *In re* Sewell's Estate, L. R., 11 Eq., 80.
[4] Morgan *v.* Morgan, 14 Beav., 72; *Re* Llewellyn's Trust, 29 Beav., 173.
[5] Holgate *v.* Jennings, 24 Beav., 623; Mackie *v.* Mackie, 5 Hare, 70.
[6] Hubbard *v.* Young, 10 Beav., 205.
[7] And see Harris *v.* Payne, 1 Drew., 181.
[8] Rowe *v.* Rowe, 24 Beav., 276; Green *v.* Britten, 1 DeG. J. & S., 655. See further as to expressions which negative the effect of the rule, Lewin, 7th Edn., 275.

CENTRAL SECRETARIAT LIBRARY

LECTURE VI.

is not to be converted, there must be a conversion.[1] The leaning of the Judges of the Court of Chancery has been rather against, than in favour of, the application of the rule, and the effect of the later cases has been to allow small indications of intention to prevent its taking effect.[2]

Where a testator, after giving estates in succession, empowered his trustees to retain all or any portion or portions of his trust-estate in the same state in which it should be at the time of his decease, or to sell or convert the same, or any part thereof, into money in such manner and for such prices and under such terms and conditions as they should, in their absolute and uncontrolled discretion, think fit, it was held the case was taken out of the rule.[3]

Trustee to be impartial.

A trustee is bound to be impartial in executing the trust, and must not benefit one *cestui que trust* at the expense of another. Thus, where a testator by his will desired his trustees to give up his farm to his nephew, the plaintiff, if the landlord would accept him as tenant; and in that case he bequeathed to him the farming-stock; and the testator also gave some real property to the plaintiff, and gave legacies and annuities to the plaintiff's father, mother, and sisters, and other persons including the trustees, one of whom was steward to the landlord, and there were hardly any assets to pay the legacies and annuities, if the plaintiff took the farming-stock, upon which the trustees represented the case to the landlord, who left it to their decision whether the plaintiff should be accepted as tenant; and they accordingly refused to let him be accepted, unless he executed a deed making over the devised real estate to pay the legacies and annuities,—it was held, that it was a breach of trust on the part of the trustees to endeavour to induce the landlord to refuse his consent to the plaintiff having the tenancy, and that the deed must be set aside. James, L. J., said: "The trustees honestly believed that the testator had made a mistake. Still they were the trustees of that will, and their duty was to carry its trusts into effect impartially; they had no right to use the power given them by their position as trustees; or any other power

[1] Pickering *v.* Pickering, 4 My. & Cr., 289; Morgan *v.* Morgan, 14 Beav., 72; Craig *v.* Wheeler, 29 L. J., Ch., 374.

[2] Macdonald *v.* Irvine, L. R., 8 Ch. Div., 121, *per* Thesiger, L. J.

[3] Gray *v.* Siggers, L. R., 15 C. D., 77. As to directions to accumulate and to lay out the income in land, see Lewin, 7th Edn., 276—280.

which they had, as a means of making a new will for the testator; for that is what their proceedings come to. . . . It was a breach of duty on the part of the trustees to endeavour to induce the landlord to refuse his consent on any grounds to what the testator showed by his will that he wished and intended."[1]

Discretion of trustees not interfered with.

If the author of the trust has reposed a discretionary power in the trustees, either to do or to abstain from doing certain things, the Court has no power or jurisdiction to control the trustees in the exercise of their discretion, so long as they act in good faith, and their determination is not influenced by improper motives.[2] "If," said Wigram, V. C.,[3] "the gift be subject to the discretion of another person, so long as that person exercises a sound and honest discretion, I am not aware of any principle or authority upon which the Court should deprive the party of that discretionary power where a proper and honest discretion is exercised." And in the recent case of *Gisborne* v. *Gisborne*[4] Lord Cairns said: "No doubt various cases have occurred in the Court of Chancery, in which, either from the trustees submitting to the Court the question of how they ought to exercise a power or a trust reposed in them, or from questions having been raised by the parties interested as to whether a trust for maintenance or a similar trust had actually arisen and ought to be acted upon, decisions have been arrived at by the Court which I should be very unwilling to throw the least doubt upon; but those decisions appear to me not at all to touch the present case, where, as I shall submit to your Lordships, you have the trustees made the absolute masters of the question, where you have them armed with a complete and uncontrolled discretion, and where they come before you stating that they are prepared to exercise that discretion within the limits within which it is confided to them by the will."[5]

Selecting objects of the trust.

Thus the Court will not interfere with the exercise of a discretionary power of selecting particular objects of the trust.[6] For instance, where property was devised to trustees

[1] Ellis *v.* Barker, L. R., 7 Ch., 104.
[2] See the cases collected, Lewin, 7th Edn., 530.
[3] Costabidie *v.* Costabidie, 6 Hare, 414. [4] L. R., 2 App. Cas., 300.
[5] See also Brophy *v.* Bellamy, L. R., 8 Ch., 798; see also Marquis Camden *v.* Murray, L. R., 16 C. D., 161.
[6] Horde *v.* The Earl of Suffolk, 2 M. and K., 59; Holmes *v.* Penney, 3 K. and J., 103; *Re* Wilke's Charity, 3 Mac. and G., 440.

LECTURE VI.

upon trust for such of the testator's children and grandchildren, or nephews and nieces, as the trustees should think fit, and the trustees gave all to one, the Court refused to interfere.[1] So the Court will not interfere with a power of sale given to trustees,[2] or with a discretionary power to abstain from paying a legacy.[3] So, where a testatrix left £1,000 upon a condition precedent, but "left her executor at liberty to give the said sum if he found the thing proper," the Court refused to interfere, saying: "The executor says he did not think it proper to advance the legacy. Nothing appears in the conduct of the young man which disqualified him from taking, but it would be quite contrary to the provisions of the will to hold, that the power given to the executor at his discretion to advance the legacy, gave the legatee a right to claim it absolutely. If that were so, the condition in the will, and the power given to the executor of dispensing with it, would be frustrated. Is the Court to decide upon the propriety of the executor withholding the legacy? That would be assuming an authority which is confided by the Court to the discretion of the executor. It would be to make a will for the testator instead of expounding it."[4]

Modes of investment.

And the Court will not interfere with the trustees' discretion as to one of several authorized modes of investment,[5] although the result may be to vary the relative rights of the *cestuis que trustent.*[6] If, however, infants are interested, the Court will interfere if the proposed securities are clearly unsafe.[7] Nor will it interfere with the discretion of the trustees as to maintenance of children,[8] unless it thinks that the discretion is not being properly exercised for the benefit of the infants.[9] Where the trustees had "an uncontrolled and irresponsible discretion," the Court refused to interfere, there being no proof of *mala fides,* although the trustees did not appear to be acting judiciously.[10] And

[1] Civil *v.* Rich, 1 Ch. Cas., 309. [2] Thomas *v.* Dering, 1 Kee., 729.
[3] *In re* Coe's Trusts, 4 K. and J., 199.
[4] Pink *v.* DeThuisey, 2 Madd., 157.
[5] Lee *v.* Young, 2 Y. and C. C. C., 532.
[6] Minet *v.* Leman, 20 Beav., 269; 7 D. M. G., 340: see further Lewin, 7th Edn., 531.
[7] Bethell *v.* Abraham, L. R., 17 Eq., 24.
[8] Collins *v.* Vining, C. P. Coop., 472; Brophy *v.* Bellamy, L. R., 8 Ch., 798.
[9] *In re* Hodges Davey *v.* Ward, L. R., 7 Ch. Div., 762.
[10] Tabor *v.* Brookes, L. R., 10 Ch. Div., 273: see also Marquis Camden *v.* Murray, L. R., 16 C. D., 170.

the Court will not interfere with the mode of executing the trust.[1] But where the power is accompanied with a duty and meant to be exercised (as a power of leasing), the Court will compel the execution, or execute it in the place of the trustees. So, where the trustees had a power-of-sale "if they should consider it advisable but not otherwise," it was held, that the power, though discretionary in form, was given to the trustees for the purposes of the will, and if those purposes could not be effected without the exercise of the power, they were bound to exercise it.[2] When such a power is conferred upon trustees to be executed by them at a fixed period, and after they have come to a judgment as to the conduct of the individual to be affected, they cannot divest themselves of the power, or execute it until the time appointed; nor can they enter into any anterior contract respecting it.[3]

Exercise of power by will.

Where a trustee had an absolute discretion to apply the trust-funds for certain charitable purposes as he might think fit, and he died without exercising the power *inter vivos*, but by his will gave definite directions as to the application of the funds, it was held that the power was duly exercised.[4]

Trustees to whom discretionary powers are given, are not bound to state their reasons for exercising the powers in a particular way. But if they do state their reasons, and it appears that their premises are wrong, the Court will then set aside the conclusion.[5]

Trustee cannot set up title to trust-property.

A trustee cannot set up a title to the trust-property adverse to that of his *cestui que trust*. In *Lord Portsmouth* v. *Vincent*,[6] tenants-at-will, who came into possession under a letting by a receiver in the Court of Chancery, were, by the neglect of the parties in the cause, allowed to remain in possession for a great number of years, and were not called on for their rent; they levied fines, and insisted on them as a bar: but Lord Hardwicke said: "No, you gained that possession as tenants under

[1] Mahon *v.* Savage, 1 Sch. and Lef., 111.
[2] Lewin, 7th Edn., 530, citing Tempest *v.* Lord Camoys, W. N., 1867, p. 296; Nickisson *v.* Cockell, 2 N. R., 557.
[3] Weller *v.* Ker, L. R., 1 Sc. App., 11.
[4] Lewin, 7th Edn., 532, citing Copinger *v.* Crehane, L. R., 11 Eq., 429.
[5] *Re* Wilke's Charity, 3 Mac. and G., 441; King (The) *v.* The Archbishop of Canterbury, 15 East, 117.
[6] Cited in Lord Pomfret *v.* Lord Windsor, 2 Ves., 476.

LECTURE VI.

the receiver of the Court; you gained that possession therefore in confidence, and you shall not, by means of that possession, defeatthe title of the persons for whom you had the possession," and he would not suffer the fine and non-claim as a bar.[1] "Where," said Knight Bruce, V. C., "a person knowingly and expressly acquires the possession of property as a trustee merely, or being in possession makes himself by contract, expressly and without qualification, a trustee of it, he cannot be allowed effectually to assert against the trust, at least as a defendant in a suit seeking the performance of the trust, any title paramount and adverse to the trust which he may himself have; he must assert it (if at all) without deriving—he must assert it so as not to derive—any advantage for it from the possession which he has as trustee, or had in that character."[2]

Claim by third person.

If, however, the trustees become aware of a title in a third person to the trust-property, and the *cestuis que trustent* are entitled to claim the property absolutely, the trustees may refuse to deliver over the fund until the question is settled.[3] And trustees cannot set up the adverse title of a third person against their *cestuis que trustent.*[4]

Delivery up of moveable property.

A trustee who sets up a title to moveable property may be compelled to deliver it up to his *cestui que trust.* The Specific Relief Act (I of 1877), s. 11, provides, that "any person having the possession or control of a particular article of moveable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, when the thing claimed is held by the defendant as the trustee of the claimant;" and the following illustration is given: "*A*, proceeding to Europe, leaves his furniture in charge of *B* as his agent during his absence. *B*, without *A's* authority, pledges the furniture to *C*, and *C* knowing that *B* had no right to pledge the furniture, advertises it for sale. *C* may be compelled to deliver the furniture to *A*, for he holds it as *A's* trustee."

[1] See Kennedy *v.* Daly, 1 Sch. and Lef., 381; Stone *v.* Godfrey, 5 D. M. G., 76; Conry *v.* Caulfield, 2 Ball and B., 272; Langley *v.* Fisher, 9 Beav.. 90; Newsome *v.* Flowers, 30 Beav.. 461; Frith *v.* Cartland, 2 H. and M., 417; Suboodra Beebee *v.* Bikromadit Singh, 14 S. D. A., 543.

[2] Attorney-General *v.* Munro, 2 DeG. and Sm., 163.

[3] Neale *v.* Davis, 5 D. M. G., 258.

[4] Newsome *v.* Flowers, 30 Beav., 461.

Failure of *cestui que trust.*

It may happen that there is no *cestui que trust* to claim the property, and no person to claim it through the settlor. According to English law, there is no escheat of a trust in fee of lands,[1] and the trustee retains the estate;[2] and if a *cestui que trust* of chattels dies intestate without next-of-kin, the trust-property goes to the Crown.[3] I am not aware of any case in which the question has been raised in this country.[4]

Trustee to keep accounts.

It is the duty of trustees to afford to their *cestuis que trustent* accurate information of the disposition of the trust-fund—all the information of which they are, or ought to be, in possession;[5] and to keep clear and distinct accounts of the property.[6] "It is the first duty of an accounting party, whether an agent, a trustee, a receiver, or an executor, for in this respect they all stand in the same position, to be constantly ready with his accounts."[7] And if the trustees destroy books of account, very cogent reasons must be given to satisfy the Court that the destruction was proper or justifiable.[8] In the case of a trust for sale, the *cestuis que trustent* have a right to say to their trustees—"What estates have you sold? What debts have you paid? And those who claim under them have the same right."[9]

If a trustee chooses to mix his accounts with those of his own trading concern, he cannot thereby protect himself from producing the original books in which any part of those accounts may be inserted.[10]

If a trustee adopts and sanctions improper accounts by his co-trustee, he will be liable for any default.[11]

A legatee has a clear right to have a satisfactory explanation of the state of the testator's assets, and an

[1] Burgess *v.* Wheate, 1 Eden, 176.
[2] Taylor *v.* Haygarth, 14 Sim., 16; Davall *v.* The New River Co., 3 DeG. and Sm., 394; Cox *v.* Parker, 22 Beav., 168.
[3] See Lewin, 7th Edn., 262.
[4] As to escheat, see Mayne's Hindu Law, ss. 504, 505.
[5] Walker *v.* Symmonds, 3 Swanst., 58, *per* Lord Eldon.
[6] Freeman *v.* Fairlie, 3 Mer., 43.
[7] Pearse *v.* Green, 1 Jac. and W., 140, *per* Sir Thomas Plumer, M. R.: see also White *v.* Jackson, 15 Beav., 191; Ganendra Mohan Tagore *v.* Upendra Mohan Tagore, 4 B. L. R., O. C., 207.
[8] Gray *v.* Haig, 20 Beav., 219.
[9] Clarke *v.* The Earl of Ormonde, Jac., 120.
[10] Freeman *v.* Fairlie, 3 Mer., 43.
[11] Horton *v.* Brocklehurst, 29 Beav., 504.

LECTURE VI.

inspection of the accounts, but he is not entitled to a copy at the expense of the estate.[1]

Vouchers.

When all the matters relating to the trust have been finally settled, the trustees are entitled to the possession of the vouchers, as their discharge to the *cestuis que trust-ent*, who, however, will have a right to inspect them, and to take copies at their own expense.[2]

Costs.

If the inability or refusal of the trustees to account renders a suit necessary, they must pay the costs of it.[3] The matter of costs, however, is within the jurisdiction of the Court; and if there has been no actual misconduct, the Court may limit the payment of costs to the period of bringing the action or of the hearing, or otherwise according to the circumstances of the case.[4]

Good faith.

In taking accounts against a trustee when he is to be fixed with a personal liability, his good faith is to be considered, and every fair allowance is to be made in his favour, especially if the demand against him is one which arose many years previously, and the *cestui que trust* was at the time cognizant of all the matters connected with it.[5]

Managing member of Hindu family.

I may here refer to the question whether the managing member of a joint Hindu family can be sued for an account. The decisions on this point were conflicting; but in the Full Bench case of *Abhaya Chandra Roy Chowdhry* v. *Pyari Mohan Guho*,[6] the question was decided in the affirmative. Couch, C. J., said:—"The members of a joint Hindu family are entitled to the family property, subject to such dispositions of it as the managing member is entitled to make, either by virtue of the power which is given him by law as manager, or of the powers that may be given to him by the consent of the other members of the family. Subject to the exercise of these powers, and to any disposition of any portion of the family property which may have been made by virtue of them, the other members of the family are clearly interested in that property. It appears to me, that the principle upon which the right to call for an account rests, is not, as has been

[1] Ottley *v.* Gilbey, 8 Beav., 602. [2] Clarke *v.* Ormonde, Jac., 120.
[3] Pearse *v.* Green, 1 Jac. and W., 135; Newton *v.* Askew, 11 Beav., 145.
[4] Springett *v.* Dashwood, 2 Giff., 521; Ottley *v.* Gilbey, 8 Beav., 602; Thompson *v.* Clive, 11 Beav., 475; White *v.* Jackson, 15 Beav., 191; Payne *v.* Evens, L. R., 18 Eq., 362.
[5] M'Donell *v.* White, 11 H. L. Cas., 570: and see Payne *v.* Evens, L. R., 18 Eq., 362. [6] 5 B. L. R., 317.

supposed, the existence of a direct agency or of a partnership, where the managing partner may be considered as the agent for his copartners. It depends upon the right which the members of a joint Hindu family have to a share of the property; and where there is a joint interest in the property, and one party receives all the profits, he is bound to account to the other parties, who have an interest in it, for the profits of their respective shares, after making such deductions as he may have the right to make. That appears to me to be the right principle, and it is the principle upon which the English Courts of Equity act in the case of joint tenants, and tenants in common, and not merely in cases of partners." And Phear, J., said:—"Every man, be he *karta* of a joint Hindu family or not, who manages the property of another person, or property in which another person is beneficially interested, upon the foundation of a trust or confidence between the two, is, in a Court of Equity and Good Conscience, accountable to the latter for the mode in which he does manage it, and for the profits which he may have made out of it. The principle upon which I understand the English Courts of Equity to act upon in those matters is simply this,—that a person who has the control of, and management of, another's property upon the footing of anything which amounts to a confidence or trust reposed in him by that other, shall not be allowed to abuse that confidence, and to make a profit out of his management, without the owner's consent; and inasmuch as the question whether or not a profit has been made, or what has been done, lies, under these circumstances, solely within the knowledge of the manager himself, a Court of Equity will make him disclose what he has done, in other words, will make him account for his administration of the property. It is the necessity for discovery, as the English lawyers term it, in order to protect the actual owner's right and interest which founds the jurisdiction of the English Courts of Equity in cases of this sort."

An individual member of a tarawad governed by the Marumakkatayam rule has no right to an account from the karanavan.[1]

Duties of trustee as to investment.

We have now to consider what are the duties of a trustee with respect to the investment of trust-moneys. In a

[1] Kunigaratu *v.* Arranganden, 2 Mad. H. C., 12.

LECTURE VI.

properly drawn instrument creating a trust, express directions will always be found as to the securities upon which the trustee is to invest the trust-funds, and the trustee is bound to adhere strictly to the modes of investment prescribed. If he does not do so, he commits a breach of trust, and will be liable for any loss that may arise; whereas, if he invests in the manner directed by the instrument of trust, he will not be liable in case of loss. But there are other cases where the instrument creating the trust is of an informal character, and does not contain any directions as to investment. It is the duty of the trustee to make the fund productive for the benefit of the persons interested, and in order to do so he must invest it in some form of security. And a trustee will not be justified in investing upon any but Government securities.[1] The Court will not allow property to be invested in public securities which are not Government securities.[2]

If a fund is properly invested, it is a clear breach of trust for the trustees to convert it into money and invest the proceeds in unauthorized securities.[3]

Personal security.

Trustees may not invest on personal security,[4] even though larger interest may be gained, for such an investment is a species of gaming;[5] and it makes no difference that the loan is on joint security.[6] A promissory note is evidence of a debt; but it cannot be considered as a security for money.[7] The rule, that a trustee may not invest on personal security, is one that "should be rung in the ears of every person who acts in the character of trustee, for such an act may very probably be done with the best and most honest intention, yet no rule in a Court of Equity is so well established as this."[8]

And trustees leaving money outstanding on personal security in which the testator himself had invested, will be liable for any loss, unless they can show that an attempt to recover the money would have been fruitless.[9]

[1] See DeSouza *v.* DeSouza, 12 Bom., 190.
[2] Sampayo *v.* Gould, 12 Sim., 435.
[3] Kellaway *v.* Johnson, 5 Beav., 319.
[4] Walker *v.* Symonds, 3 Swanst., 63; Clough *v.* Bond, 3 M. & Cr., 496; Watts *v.* Girdlestone, 6 Beav., 188; Graves *v.* Strahan, 8 D. M. G., 291.
[5] Adye *v.* Feuilleteau, 1 Cox, 25.
[6] Holmes *v.* Dring, 2 Cox, 1.
[7] Ryder *v.* Bickerton, 3 Swanst., 81 (*n*), *per* Lord Hardwicke.
[8] Holmes *v.* Dring, 2 Cox, 1 *per* Lord Kenyon.
[9] Styles *v.* Guy, 1 Mac. & G., 422.

LECTURE VI.

Shares in companies.

Investments in the stock or shares of any private company are not justifiable without express authority, and the trustees will be liable for loss if the company fails or the shares become depreciated.[1]

Where personal security allowed.

Trustees do not commit a breach of trust by lending out the trust-fund on personal security, if the instrument creating the trust expressly authorizes such a mode of investment.[2] But a power to place out the trust-fund at the trustees' discretion, will not justify an investment on such security.[3] So a power to invest upon such security as to the trustees seems expedient,[4] or on the "best and most sufficient security,"[5] or "on good private securities,"[6] will not justify investments on personal security. Nor will a trust to place the trust-fund "out to interest or other way of improvement" authorize an investment in trade.[7] And a trust to invest at "the discretion of the trustees," will not justify them in investing in securities of foreign states, even though the testator approved of such investments.[8] Where the trustees of a sum of money for *A* for life, remainder for her children, were authorized by the settlement to lend the trust-fund upon such real or *personal security* as should be thought good and sufficient, and the trustees lent it to a person in *trade* whom *A* had married, and the money was lost, they were made responsible for the amount. Sir W. Grant, M. R., said: "The authority did not extend to an *accommodation;* it was evident the trustees had, upon the marriage, been induced to accommodate the husband with the sum which they had no power to do.[9]"

Where trustees of a marriage settlement were authorized, with the consent of the husband and wife, to invest the funds on such security, "either real or personal," as they, with such consent, should think proper, and at the date of

[1] Trafford *v.* Boehm, 3 Atk., 439: see as to investment on shares, Lewin, 7th Edn., 293—295.

[2] Forbes *v.* Ross, 2 Bro. C. C., 430; Paddon *v.* Richardson, 7 D. M. G., 563.

[3] Pocock *v.* Reddington, 5 Ves., 794; Bethell *v.* Abraham, L. R., 17 Eq., 24.

[4] Attorney-General *v.* Higham, 2 Y & C. C. C., 634.

[5] Mills *v.* Osborne, 7 Sim., 30.

[6] Westover *v.* Chapman, 1 Coll., 177.

[7] Cock *v.* Goodfellow, 10 Mod., 489.

[8] Bethell *v.* Abraham, L. R., 17 Eq., 24.

[9] Lewin, 7th Edn., 291, citing Langston *v.* Ollivant, G. Coop., 33: see also Boss *v.* Godsall, 1 Y. and C. C. C., 617.

LECTURE VI.

the marriage, part of the trust-funds were outstanding on the security of the husband's note-of hand, the Court allowed the investment to be continued on the husband executing a bond to the trustees for the amount of the loan.[1]

One *cestui que trust* not to be benefited at expense of others.

Trustees must not invest in such a manner as to benefit one or more of the *cestuis que trustent* without having regard to the interests of the others. If they do so, and any loss results, they will be liable.[2] Even where the written consent of the tenant-for-life is required to a change of investment, the trustees are bound, if the fund is improperly invested, to re-invest it so as to protect the interests of the remainder men, although the tenant-for-life objects to the re-investment.[3]

Consent of *cestuis que trustent* to change.

Where the instrument of trust contains a power of investment, but requires the consent of any of the *cestuis que trustent* or of the trustees, to the investment or to a change of securities, all the conditions of the power must be strictly followed. If, however, the terms of the power have not been complied with, a *cestui que trust*, who is *sui juris*, and who has acquiesced in the investment, cannot afterwards make any complaint.[4]

So if the power authorizes an advance to three on a joint interest, an advance to two is not justifiable.[5]

Continuing investment

In some cases trustees may continue existing investments, but they should be careful to see that the securities are good.[6]

Varying securities.

"Trustees may, as they generally are, be expressly empowered to invest on *real* as well as Government securities, and where this is the case, and there is a power to vary securities, the trustees may safely sell out Government securities, and invest the proceeds on a mortgage; for, in this case, although the tenant-for-life may obtain a higher rate of interest, yet no injury is done to the remainder man, as the capital is a constant quantity, and if the tenant-for-life live long enough, he himself will have the benefit. A notion is sometimes entertained that where the stock

[1] Pickard *v.* Anderson, L. R, 13 Eq., 608.

[2] Raby *v.* Ridehalgh, 7 Beav., 109, *per* Turner, L. J.; Stuart *v.* Stuart, 3 Beav., 430.

[3] Harrison *v.* Thexton, 4 Jur., N. S., 550.

[4] See Lewin, 7th Edn., 292.

[5] Fowler *v* Reynal, 3 Mac. and G., 500.

[6] Arnould *v.* Grinstead. W. N., 1872, p. 216; Angerstein *v.* Martin, T. and R., 239; Ames *v.* Parkinson, 7 Beav., 379.

has become depreciated since the original purchase of it by the trustees, the trustees cannot sell out the stock and lend the money on mortgage without being answerable for the difference between the bought and the sale price. But there is no ground for this apprehension, for if the trust authorize the purchase of stock at all, the trustees cannot be wrong in dealing with it at the market-price of the day.

No doubt if there were a sudden fall under peculiar circumstances, the trustees should not, without good reason, sell out at the very moment of casual depreciation; but if the power be *bonâ fide* exercised, the mere fact of a depreciation below the bought price cannot *per se* constitute a breach of duty."[1]

Investment or mortgage.

Where trustees are empowered to invest on mortgage, they should not, in the case of land, invest more than two-thirds of the actual value of the estate; in the case of houses, not more than one-half. And they should not invest in leaseholds under any circumstances, as these are wasting securities. Nor should they, under any circumstances, invest on the security of a second mortgage.[2]

Trustees may not lend to themselves

Trustees empowered to lend the trust-funds on mortgage may not lend to one of themselves. The reason is, that there is the possibility of a conflict between the trustees' duty and interest, and the *cestuis que trustent* are entitled to have the impartial judgment of all the trustees as to the sufficiency of the security.[3]

Paying over mortgage-money.

Trustees must be careful, when they advance money on mortgage, not to pay over the money to the mortgagor until the security is ready, for in case of loss by fraud they will be personally liable.[4]

Consent of Court to investment.

The Court will not, so long as an estate remains to be administered in it, allow a purchase, or a mortgage, or any other investment to be made, unless the Court is satisfied of its safety. The reason is, that the Court has to protect the property for all claimants, and even where the trustees have an undisputed power to make a purchase, or to make a mortgage, a reference is usually made to ascertain the propriety of the investment in all respects.[5]

[1] Lewin, 7th Ed., 296.

[2] See further as to investment, Lewin, 7th Ed., Ch. XIV.

[3] Stickney *v.* Sewell, 1 M. and Cr. 8; ——— *v.* Walker, 5 Russ., 7; Francis *v.* Francis, 5 D. M. G., 108; Fletcher *v.* Green, 33 Beav., 426.

[4] Rowland *v.* Witherden, 3 Mac. and G., 568; Hanbury *v.* Kirkland, Sim., 265; Broadhurst *v.* Balguy, 1 Y. and C. C. C., 16.

[5] Bethell *v.* Abraham, L. R., 17 Eq., 27, *per* Jessel, M. R.

LECTURE VI.

Trustee's and Mortgagee's Powers Acts.

In England, the duties of trustees as to investment are defined by various Statutes.[1] In cases "to which English law is applicable"[2] in this country, the Trustee's and Mortgagee's Powers Act[3] provides (s. 5), that where trust-property is sold under a power-of-sale, the money received "shall be laid out in the manner indicated in that behalf in the will, deed, or instrument containing the power-of-sale; and until the money to be received upon any sale as aforesaid shall be so disposed of, the same shall be invested at interest in Government securities for the benefit of such persons as would be entitled to the benefit of the money, and the interest and profits thereof, in case such money were then actually laid out as aforesaid: provided that if the will, deed, or instrument shall contain no such indication, the persons empowered to sell as aforesaid shall invest the money so received upon any such sale in their names upon Government securities in India, and the interest of such securities shall be paid and applied to such person or persons for such purposes and in such manner as the rents and profits of the property sold as aforesaid would have been payable or applicable in case such sale had not been made." And s. 32 provides that, "trustees having trust-money in their hands which it is their duty to invest at interest, shall be at liberty, at their discretion, to invest the same in any Government securities, and such trustees shall also be at liberty, in their discretion, to call in any trust-funds invested in any other securities than as aforesaid, and to invest the same on any such securities as aforesaid, and also from time to time, at their discretion, to vary any such investments as aforesaid for others of the same nature. Provided always, that no such original investment as aforesaid, and no such change of investment as aforesaid, shall be made where there is a person under no disability entitled in possession to receive the income of the trust-fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person." The Official Trustee's Act[4] provides (s. 14) that "the Official Trustee shall cause all capital moneys received by him to be invested in

Official Trustee's Act of 1864, s. 14.

[1] See Lewin, 7 Ed., 282—288.
[2] As to the meaning of these words, see *ante*, p. 15.
[3] XXVIII of 1866.
[4] XVII of 1864.

Government securities, or otherwise as the Court shall direct: and if in any case the trust-funds or any of them shall, at the time of their vesting in the Official Trustee, be invested otherwise than as provided in the deed or will creating the trust, or than as ordered by the Court, it shall be the duty of the Official Trustee, as soon as he reasonably can, to realize the funds so improperly invested, and to invest the same in Government securities or otherwise as the Court shall direct."

Remedy in case of non-investment.

Where trustees are bound by the terms of their trust to invest the money in the public funds, and instead of doing so, retain the money in their hands, the *cestuis que trustent* may elect to charge them, either with the amount of the money and interest, or with the amount of the stock which they might have purchased with the money.[1] The doctrine of the Court, when it applies this rule, is, that the trustee shall not benefit by his own wrong. If he had done what he was bound to do, a certain amount of Government securities would have been forthcoming for the *cestuis que trustent.* And therefore, if called upon to have such securities forthcoming, he is bound to do so; just as, in ordinary cases, every wrong-doer is bound to put the party injured, so far as the nature of the case allows, in the same situation in which he would have stood if the wrong had not been done.[2]

But the grounds on which the right of election in the *cestuis que trustent* rest, wholly fail in a case where a trustee, having an option to invest in Government securities, or on the security of immoveable property, neglects his duty and carelessly leaves the trust-funds in some other state of investment. In such a case, the *cestui que trust* cannot say to the trustee—"If you had done your duty, I should now have had a certain sum in Government securities, or the trust-fund would now consist of a certain amount of Government securities." It is obvious that the trustee might have duly discharged his duty, and yet no such result need have ensued. In such a case the trustee is liable for the principal and interest only. "Where a man is bound by covenants to do one of two things, and does neither, there in an action by the covenantee, the measure

[1] Shepherd *v.* Mouls, 4 Hare, 503; Byrchall *v.* Bradford, 6 Madd., 235; Robinson *v.* Robinson, 1 D. M. G., 247.

[2] Robinson *v.* Robinson 1 D. M. G., 256.

LECTURE VI.

of damage is in general the loss arising by reason of the covenantor having failed to do that which is least, not that which is most, beneficial to the covenantee: and the same principle may be applied by analogy to the case of a trustee failing to invest in either of two modes equally lawful by the terms of the trust. . . . The trustee is not called upon to exercise an option retrospectively, but is made responsible for not having exercised it at the proper time, for not having made one of two several kinds of investment. And a reason for his being in such a case chargeable only with the money invested, and not with the Government securities which might have been purchased, is, that there never was any right in the *cestui que trust* to compel the purchase of Government securities. The trustee is answerable for not having done what he was bound to do, and the measure of his responsibility should be what the *cestui que trust* must have been entitled to in whatever mode that duty was performed."[1] In *Raphael* v. *Boehm*[2] Lord Eldon said: "Where there is an express trust to make improvement of the money, if the trustee will not honestly endeavour to improve it, there is nothing wrong in considering him as the principal to have lent it to others, and as often as he ought to have received it and lent it to others, if the demand be interest, and interest upon interest." The case was re-argued before Lord Erskine, who agreed with Lord Eldon;[3] and Lord Eldon subsequently expressed his opinion that his original judgment was right.[4] Where a trustee who was directed to invest the residue of his testator's estate in consols, and to accumulate the dividends, invested it on mortgage of real estate, he was held liable to make good the amount of stock which would have been purchased in consols, together with the amount of accumulation which would have been produced by a proper investment of the dividends of such stock.[5]

So an executor who neglects to pay debts, or who, after paying debts and legacies, neglects to account for the surplus, or an assignee who neglects to pay dividends, will be liable to pay interest,[6] and it is no excuse that he

[1] Robinson *v* Robinson, 1 D. M. G., 257, *per* Lord Cranworth, L. C.
[2] 11 Ves., 107. [3] 13 Ves., 407.
[4] 13 Ves., 590: see also Dornford *v.* Dornford, 12 Ves., 127.
[5] Pride *v.* Fooks, 2 Beav., 430. See also Knott *v.* Cottee, 16 Beav., 77; Wilson *v.* Peake, 3 Jur., N. S., 155. [6] See Lewin, Ch. XIV., s. 5.

himself derived no benefit from the moneys in his hands.[1] Where, however, an executor in good faith retained a balance to which he thought himself entitled, he was not charged with interest.[2]

Remedy in case of wrongful investment.

If trustees having power to invest on certain securities, and to vary such investments from time to time, realize money properly invested, for the purpose of investing it in a security not warranted by the instrument of trust, the *cestui que trust* has two remedies: *First*, he may compel the trustees to restore the trust-fund to its original state. The Court will not treat the sale as lawful, and the investment as unlawful, so as to satisfy the trust by replacing the money, but the whole will be treated as one unjustifiable transaction and the original security must be replaced,—that is to say, if the fund was originally invested in Government securities, it will not be sufficient to refund the money realized by the sale; but an equivalent amount of Government securities must be purchased[3] and the intermediate dividends must be replaced;[4] or, *secondly*, the *cestui que trust* may require the trustees to account for the money received on the sale with interest if that would be most advantageous to him.[5] In England, the rate of interest is 5 per cent.[6] In this country it would be at the rate of 6 per cent., the Court rate of interest. When trustees have committed a breach of trust by an improper sale of the trust-fund, they are not discharged from the consequences of the breach of trust by replacing the fund in some security, not the security the sale of which constituted the breach of trust.[7] In a case where the trustee did not seek to make anything himself, but was honourably unfortunate in having yielded to the importunity of one of the *cestuis que trustent*, it was held that, although the trustee was bound to replace the specific stock, the *cestuis*

[1] See Lewin, Ch. XIV., s. 5. [2] Brunero *v.* Pemberton, 12 Ves., 386.

[3] Phillipson *v.* Gatty, 7 Hare, 516; Norris *v.* Wright, 14 Beav., 304.

[4] Davenport *v.* Stafford, 14 Beav., 335.

[5] Bostock *v.* Blakeney, 2 Bro. C.C., 653; *Ex parte* Shakeshaft, 3 Bro. C.C., 197; Raphael *v.* Boehm, 11 Ves., 108; Harrison *v.* Harrison, 2 Atk., 121; Bate *v.* Scales, 12 Ves., 402; Phillipson *v.* Gatty, 7 Hare, 516; Norris *v.* Wright, 14 Beav., 305; Rowland *v.* Witherden, 3 Mac. and G., 568; Wiglesworth *v.* Wiglesworth, 16 Beav., 269.

[6] Crackelt *v.* Bethune, 1 Jac. and W., 587; Moseley *v.* Ward, 11 Ves., 581; Pocock *v.* Reddington, 5 Ves., 794; Pioty *v.* Stace, 4 Ves., 620; Jones *v.* Foxall, 15 Beav., 392.

[7] Lauder *v.* Weston, 3 Drew., 394.

LECTURE VI.

que trustent should not have the option of taking the proceeds with interest.[1]

Insolvency of trustee.

In the case of the insolvency of a trustee, the *cestui que trust* has the option of proving for the proceeds of the sale with interest, or for the cost of the specific stock at the time of the insolvency with the interim dividends.[2]

Duties of trustees for sale or mortgage.

Where the instrument of trust directs the trustees to raise money by the sale or mortgage of the trust-property, they may act without the leave of the Court.[3] But if a suit respecting the trust has been instituted, the trustees cannot deal with the property without the leave of the Court, for by the suit the execution of the trust is in the hands of the Court.[4] "Private contracts, therefore, after the institution of a suit, can only be entered into by trustees subject to the approbation of the Court, and a condition is commonly annexed that the contract shall be null and void, unless the sanction of the Court be obtained within a limited period. Cases have occurred where, from accidental circumstances, the sanction has not been obtained within the time, and then by the death of the purchaser the contract has dropped to the ground, and the representatives of the purchaser have not felt themselves justified in renewing it. The better mode would be, to give liberty to the purchaser at any time after the expiration of a limited period, but before any confirmation by the Court, to determine the contract."[5]

Trustee bound to sell to best advantage.

A trustee for sale is bound to sell the trust-property to the best advantage, and to use all reasonable diligence to obtain a proper price.[6] If he is negligent in conducting the sale, as by not advertising,[7] he will be personally liable for any loss occasioned. All the trustees are equally liable, and cannot escape responsibility, on the ground that the conduct of the sale was delegated to one of their number.[8] If, however, a trustee enters into a contract for the sale of trust-property, he is not bound to break off the contract in

[1] Lewin, Ch. XIV., s. 4, citing O'Brien *v.* O'Brien, 1 Moll., 533.
[2] *Ex parte* Shakeshaft, 3 Bro. C. C., 197.
[3] Earl of Bath *v.* Earl of Bradford, 2 Ves., 590.
[4] Walker *v.* Smallwood, Amb., 676; Drayson *v.* Pocock, 4 Sim., 283.
[5] Lewin, 7th Edn., 383.
[6] Downes *v.* Grazebrook, 3 Mer., 208; Mathie *v.* Edwards, 2 Coll., 480; Ord *v.* Noel, 5 Madd., 438.
[7] Ord *v.* Noel, 5 Madd., 438; Pechel *v.* Fowler, Anst., 549.
[8] *In re* Chertsey Market, 6 Price, 285; Oliver *v.* Court, 8 Price, 166.

order to sell to another person who makes a higher offer;[1] and when there are two offers, and it is not quite clear which is the most advantageous, the trustee will not be liable for refusing to accept the offer preferred by the *cestui que trust*.[2]

Must attend to interest of all parties.

The trustees must pay equal and fair attention to the interests of all persons concerned. If they, or those who act by their authority, fail in reasonable diligence,—if they contract under circumstances of haste and improvidence,—if they make the sale with a view to advance the particular purposes of one party interested in the execution of the trust at the expense of another party—a Court of Equity will not enforce the specific performance of the contract, however fair and justifiable the conduct of the purchaser may have been.[3] So, specific performance will not be enforced against trustees, if they have entered into an agreement by mistake to sell at an inadequate consideration;[4] nor, where there has been a substantial misdescription on their part, will specific performance with compensation be enforced against them;[5] and in no case will specific performance be granted if there has been a breach of trust.[6] The sale of property at a grossly inadequate value is a breach of trust which affects the title in the hands of a purchaser.[7]

"The usual course," said Lord Romilly,[8] "is, for *cestuis que trustent*, who are the persons most interested in the matter, and who have the strongest motive for obtaining the highest possible price, to enter into a conditional contract of sale, and then to obtain the assent of the trustee, who, when he has satisfied himself that the sum proposed to be given for it is the value of the property, ought to sanction a sale which is beneficial for the persons for whom he is trustee." This of course is only when the *cestuis que trustent* are persons competent to contract.

Valuation.

The trustee before sanctioning a sale should have a valuation of the property made by some qualified person.[9]

[1] Goodwin *v.* Fielding, 4 D. M. G., 90; Harper *v.* Hayes, 2 DeG. F. and J., 542 [2] Selby *v.* Bowie, 4 Giff., 300.

[3] Ord *v.* Noel, 5 Madd., 440; *Anon.*, 6 Madd., 11; Turner *v.* Harvey, Jac., 178; Mortlock *v.* Buller, 10 Ves., 292; Hill *v.* Buckley, 17 Ves., 394.

[4] Bridger *v.* Rice, 1 Jac. and W., 74.

[5] White *v.* Cuddon, 8 C. and F., 766.

[6] Wood *v.* Richardson, 4 Beav., 176; Fuller *v.* Knight, 6 Beav., 205; Thompson *v.* Blackstone, *ib.*, 470; Sneesby *v.* Thorne, 7 D. M. G., 399; Ramlal Thakursidas *v.* Lakhmichand Muniram, 1 Bom. H. C., Appx., lxii.

[7] Stevens *v.* Austen, 7 Jur., N. S., 873.

[8] Palairet *v.* Carew, 32 Beav., 568.

[9] Oliver *v.* Court, 8 Price, 165; Campbell *v.* Walker, 5 Ves., 630.

LECTURE VI.

Absolute trust for sale will not authorize mortgage.

An absolute trust for sale, from which it appears that it was the intention of the author of the trust that the property should be converted, will not authorize the trustees in mortgaging.[1] But where the trustees are authorized to sell in order to raise money for a particular purpose, as for instance, to pay debts, and it does not appear that it was the intention of the author of the trust that the property should be converted, the trustees may raise the necessary money by means of a mortgage.[2] "Generally speaking," said Lord St. Leonards,[3] "a power of sale, out-and-out, for a purpose or with an object beyond the raising of a particular charge, does not authorize a mortgage; but where it is for raising a particular charge, and the estate itself is settled or devised subject to that charge, there it may be proper, under the circumstances, to raise the money by mortgage, and the Court will support it as a conditional sale, as something within the power, and as a proper mode of raising the money."

Trust to mortgage will not authorize sale.

Conversely, a trust to raise money by way of mortgage will not authorize a sale, and the Court will not, in such a case, direct a sale, even though it clearly appears that a sale would be more advantageous.[4]

Trust for sale survives.

A trust for sale survives, and it is not necessary, where one trustee has died before a contract has been entered into, to go to the Court in order to carry the sale into effect.[5]

Trustees bound to make good title.

Trustees are bound, like other persons, to make a good title; they may of course protect themselves by express stipulations.[6]

Counsel's opinion.

"It would be prudent before proceeding to the execution of the trust to take the opinion of counsel whether a good title can be deduced. Should the contract for sale be unconditional, and the title prove bad, the purchaser in a suit for specific performance would have his costs against the trustee, though the trustee, where his conduct was excusable, might charge them upon the trust-estate under the head of expenses."[7]

[1] Haldenby v. Spofforth, 1 Beav., 390; Stroughill v. Anstey, 1 D M. G., 635; Page v. Cooper, 16 Beav., 396; Devaynes v. Robinson, 24 Beav., 86. [2] Ball v. Harris, 4 M. & Cr., 264.

[3] Stroughill v Anstey, 1 D. M. G., 645.

[4] Drake v. Whitmore, 5 DeG. and Sm., 619. See further as to powers of sale, Lewin, 7th Edn., 392.

[5] Lane v. Debenham, 11 Hare, 188

[6] White v. Foljambe, 11 Ves., 343; M'Donald v. Hanson, 12 Ves., 277

[7] Lewin, 7th Ed., 396.

LECTURE VI.

Payment of purchase-money.

After property has been sold under a power of sale, the trustee should not let the purchaser into possession until the whole amount of the purchase-money has been paid.[1] The purchaser is not bound to pay the money to the trustees personally; but payment to an authorized agent of the trustees will bind them, and discharge the purchaser.[2]

Duties of trustees for purchase.

It sometimes happens that trustees are directed to lay out the trust-funds in the purchase of lands. Such a direction is not very common, and I only propose to deal with this branch of the law very shortly.

The general rule is, that trustees for purchase, like all other trustees, are bound to discharge the duty prescribed; and failing to do so are answerable for the consequences, as if a specific fund be bequeathed to trustees upon trust to lay out on a purchase, and they neglect to call in the fund and lay it out, they are liable to compensate the *cestui que trust* for the consequences.[3] The trustees must take care to have the estate valued on their own behalf, and must not be content with the valuation of the vendor.[4] They must see that a good title is shown, and will be justified in taking legal advice.[5] If the trust-estate is in the hands of the Court, the trustees can only contract subject to the approval of the Court, which will direct an inquiry as to whether the purchase is beneficial, and if so, whether a good title can be made.[6] Trustees having a trust or power to purchase must exercise a joint discretion as to the propriety of the purchase, and therefore, as no man can be a judge in his own case, they are precluded from buying from one of themselves. If such a purchase be really desirable, it might be carried out by a friendly suit for obtaining the sanction of the Court.[7]

The trustees, where the money is not under administration by the Court, need not disclose the trust to the vendor either in the contract or in the conveyance. If they do so, it will embarrass the vendor by obliging him to see that the purchase-money is properly applied in pursuance of the trust.[8]

[1] Oliver *v.* Court, 8 Price, 166; Browell *v.* Reed, 1 Hare, 434. As to the conveyance and covenants, &c., see Lewin, 7th Edn., 401—406.

[2] Hope *v.* Liddell, 21 Beav., 183; Robertson *v.* Armstrong, 28 Beav., 123: and see *In re* Fryer 3 K. and J., 317; Viney *v.* Chaplin, 2 DeG. and J., 468; West *v.* Jones, 1 Sim., N. S., 205

[3] Lewin, 7th Edn., citing Craven *v.* Craddock, W. N., 1868, p. 229.

[4] Ingle *v* Partridge, 34 Beav., 412.

[5] Eastern Counties Railway Co. *v.* Hawkes, 5 H. L. Cas., 363.

[6] Bethell *v.* Abraham, L. R, 17 Eq., 27]; *Ex parte* The Governors of Christ's Hospital, 2 H and M., 166.

[7] Lewin, 7th Ed., 455. [8] *Ibid*, 457.

LECTURE VII.

DUTIES AND LIABILITIES OF TRUSTEES.

Time within which sale of trust-property to be made — Discretion to be exercised — Conveyance of trust-property to *cestuis que trustent* — Distribution of the trust-fund — Derivative title — Payment after death of *cestui que trust* — Appointment of trustee to assist in distributing — Presumption of death — Rebuttal of presumption — Release — Liability for payment to wrong persons — Costs — Interest — Bond of indemnity — Authority from *cestui que trust* to receive the money — Payment on written authority — Payment to persons under disability — Partners — Payment to single trustee — Overpayment — Refund to executor — Payment when debt from testator subsisting — Liability of trustee for breach of trust — Trustee liable though he has not benefited — Extent of liability — Trustee about to abscond — Criminal breach of trust — Liability of professional adviser — Partner — Loss by accident — Neglect to obey directions in instrument of trust — To pay premiums — Sale to purchaser for valuable consideration without notice — Agent — Barnes *v.* Addy — Limitation — Wilful default — Concurrence — Fraud by trustees — By *cestui que trust* — Acquiescence — Delay — Release and confirmation — No set-off in respect of breach of trust — Liability for breach of trust by predecessor or co-trustees — Trustee joining in receipt for conformity — Trustees giving receipt bound to see to investment — Walker *v.* Symonds — Trustee joining in act for convenience — Executor joining in receipt for conformity — Executor must ascertain that money required — Executor not liable as such for act of co-executor — Styles *v.* Guy — Liability under decree for common account — Unnecessarily handing over assets — Restraining intended breach of trust — Several liability of co-trustees — Limitation of liability — Contribution — Impounding fund in Court — Costs — Trustee paying under power-of-attorney — Payment without notice of transfer — Indemnity-clause.

Time within which sale of trust-property to be made.

WHERE the instrument creating the trust contains a direction to the trustees to sell and convert the trust-property, the trustees will be allowed a reasonable time within which to effect the sale, even though the direction is to convert "with all convenient speed." "A direction to convert with all convenient speed," said Sir C. C. Pepys, M. R.,[1] "is no more than the ordinary duty implied in the office of an executor, and there must necessarily be some discretion. If a reasonable discretion were to be denied to an executor, if it were to be laid down as an inflexible

[1] Buxton *v.* Buxton, 1 M. and Cr., 80, 93.

rule that he ought to convert the assets without waiting or considering how far it was for the interest of those who are beneficially entitled, there would of necessity be always an immediate sale; the executor would be bound to sell at whatever loss. Such a rule would be in its operation most injurious, and it has never been acted upon by the Court, which, in cases of this kind. has always considered what is for the interest of the parties concerned."[1]

Discretion to be exercised.

It is impossible to fix a particular period within which an executor should convert his testator's property, but a reasonable discretion must be allowed to the trustees, and whether they have exercised such a discretion must depend on the facts.[2] "You cannot," said Sir J. Romilly, M. R.,[3] "fix one period for selling every species of property. Thus, suppose the testator possessed a large quantity of horses, it would be culpable to keep them at a great expense, incurring necessarily a great outlay for their maintenance, instead of selling them at once. But with respect to other property, there must be a reasonable time allowed for selling it." The usual time is twelve months.[4] In one case two months were held to be a reasonable time within which to break up a testator's establishment.[5] And where executors sold the stock-in-trade and good-will of a business three weeks after their testator's death, though against the wish of the *cestui que trust*, and though there was evidence that a better price might have been obtained, they were held not responsible, as they had acted honestly.[6] There is no fixed rule that conversion must take place by the end of the year, but that is the *primâ facie* rule, and executors who do not convert by that time, must show some reason why they did not do so.[7]

But if the trustees have acted *bonâ fide*, and according to the best of their judgment, and it appears that a sale within twelve months must have resulted in a loss, they will not be liable.[8] Trustees will, however, be liable for loss

[1] Parry *v.* Warrington, 6 Madd., 155.
[2] Buxton *v.* Buxton, 1 My. and Cr., 93.
[3] Hughes *v.* Empson, 22 Beav., 183.
[4] See DeSouza *v.* DeSouza, 12 Bom., 190; Parry *v.* Warrington, 6 Madd., 155; Vickers *v.* Scott, 3 M. and K., 500; Fitzgerald *v.* Jervoise, 5 Madd., 25. See Act V of 1881, s. 117.
[5] Field *v.* Peckett (No. 2), 29 Beav., 576.
[6] Selby *v.* Bowie, 4 Giff., 300; affd., 9 Jur., N. S., 425.
[7] Grayburn *v.* Clarkson, L. R., 3 Ch., 606.
[8] Garrett *v.* Noble, 6 Sim., 504; Buxton *v.* Buxton, 1 M. and Cr., 80.

LECTURE VII.

caused by any improper delay.[1] Where trustees delayed selling for twenty-five years, they were held to be liable;[2] and persons who deal with trustees selling at a considerable distance of time, are under an obligation to enquire and see that no breach of trust is being committed.[3] A trust to sell "at such time and in such manner" as the trustees think fit, will not justify the trustees in arbitrarily postponing the sale to an indefinite period, so as to place the tenant-for-life and those in remainder in a totally different relative situation from that in which they would have been had the sale been made with reasonable diligence.[4] Where property was devised to trustees upon trust with all convenient expedition, and within five years after the testator's death absolutely to sell and convey the premises, it was held, that the trustees could make a good title upon a sale after the expiration of that period. "There is nothing," said Turner, V. C., "in the will importing a negative on a sale being effected by the trustees after the expiration of five years. If there had been a provision negativing any sale by the trustees after that period, there might have been a sufficient ground for this Court refusing to interpose to enforce specific performance of the agreement. The question is, whether it is to be collected from the will, that the sale, which must at any rate be effected notwithstanding the lapse of the five years, may not after that time be made by the trustees, or whether it must then be made under the direction of the Court of Chancery by the Act of the Court. I cannot impute the latter intention to the testator. . . . I think the expression of the will as to the five years is only directory to the trustees, that they might make the payments out of the trust-funds within that time, if possible."[5] The onus is on the trustees to show that the interests of the *cestuis que trustent* have not been injuriously affected by the delay.[6]

Where a testator left money invested in speculative securities, and the executors waited for twelve months, by which time the market had fallen, and they, hoping the

[1] Pattenden *v* Hobson, 22 L. J., Ch., 697; Cuff *v.* Hall, 1 Jur., N. S., 972; Devaynes *v.* Robinson, 24 Beav., 86.

[2] Fry *v.* Fry, 27 Beav., 144.

[3] Stroughill *v.* Anstey, 1 D M. G., 635.

[4] Walker *v.* Shore, 19 Ves., 391: see Wilkinson *v.* Duncan, 23 Beav., 469.

[5] Pearce *v.* Gardner, 10 Hare, 287, 291: and see Cuff *v.* Hall, 1 Jur., N. S., 972; De La Salle *v.* Moorat, L. R., 11 Eq., 8.

[6] Cuff *v.* Hall, 1 Jur., N. S., 972.

market would rise, delayed the sale, and a loss ensued,—it was held, that they ought not to be made liable. "The executors," said James, L. J., "acted with no view of obtaining any benefit to themselves; they appear to have acted honestly with a view to what they thought beneficial to everybody interested. In the honest exercise of their discretion they thought it more prudent to wait for a rise, and we think they ought not to suffer because it turns out that they committed an error of judgment. It would be very hard upon executors, who have been saddled with property of this speculative kind and have endeavoured to do their duty honestly, if they were to be fixed with a loss arising from their not having taken what, as it proved by the result, would have been the best course."[1]

If a testator gives an absolute discretion to his executors to postpone the sale and conversion of his estate, they are not bound by the ordinary rule to convert the property within a year, even though some of it consists of shares in an unlimited company. And they will not, in the absence of *mala fides*, be liable for loss arising to the estate from non-conversion.[2]

If the instrument creating the trust does not contain any special direction as to sale, it is not usual for the trustees to sell except upon the request of some one or more of their *cestuis que trustent*, or under circumstances which render a sale necessary or expedient, or unless the property is not of a permanent character.[3]

Conveyance of trust-property to *cestuis que trustent*.

When the duties of trustees are at an end, they must convey the trust-property to their *cestuis que trustent* upon its being clearly and satisfactorily proved to them that their duties are at an end, unless they have notice of any disposition or incumbrance made by the *cestuis que trustent* or any of them.[4]

Distribution of the trust-fund.

When a trustee is called upon to distribute the trust-fund, he has a right to know the title of those who claim to be *cestuis que trustent*.[5] And the necessity of seeing that the trust-money reaches the proper hand is obligatory, not only on trustees regularly invested with the

[1] Marsden *v.* Kent, L. R., 5 Ch. Div., 600: and see Sculthorpe *v.* Tipper, L. R., 13 Eq., 232; Turner *v.* Buck, L. R., 18 Eq., 301.
[2] *In re* Norrington Brindley *v.* Partridge, L. R., 13 Ch. Div., 654.
[3] See Dart V. and P., 5th Edn., 59.
[4] Frederick *v.* Hartwell, 1 Cox, 193; Holford *v.* Phipps, 3 Beav., 440.
[5] Hurst *v.* Hurst, L. R., 9 Ch., 762.

LECTURE VII.

character, but on all persons having notice of the equities, as if *A* lend a sum to *B*, and *B* afterwards discovers that it is trust-money, he cannot pay it back to *A*, unless *A*, as trustee, has a power of signing a receipt for it.[1]

Derivative title.

It occasionally happens that other persons than the original *cestuis que trustent* may come to have an interest in the trust-property, and questions arise as to how far the trustees are liable if they part with the trust-fund without noticing the persons who have subsequently acquired an interest in it. For instance, the instrument creating the trust may give *A* a life-interest, with a power of appointment among his children. Here the trustees must be careful to ascertain whether any appointment has been made, and who are the persons entitled under it. So if they have notice of an incumbrance having been created by a *cestui que trust*, they must ascertain whether it is still subsisting, otherwise they will be liable if they pay to the original *cestui que trust*.[2] New trustees are not bound to make any enquiries of the old trustee as to incumbrances.[3]

Payment after death of *cestui que trust*.

Upon the death of a *cestui que trust*, the trustee must only pay to the person duly authorized by law to give receipts for property belonging to the *cestui que trust*. He has nothing to do with any disputes as to the persons ultimately entitled, and if he mixes himself up with such disputes and refuses to pay over the trust-fund to the person entitled to demand it, he will be liable for the costs of a suit to recover it.[4]

Appointment of trustee to assist in distributing.

If a surviving trustee be placed in an embarrassing situation as regards the distribution or management of the fund, it is said that he has a right to ask for the appointment of a new trustee to assist him by his counsel.[5]

Presumption of death.

According to English law, if a person has not been heard of for seven years, there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption but of evidence, and the *onus* of proving that the death took place at any particular time within the seven years, lies upon the person who claims a

[1] Lewin, 7th Edn., 316, citing Sheridan *v.* Joyce, 7 Ir. Eq. Rep., 115.
[2] Cothay *v.* Sydenham, 2 Bro. C. C., 391; Leslie *v.* Baillie, 2 Y. and C. C. C, 91; Cresswell *v.* Dewell, 4 Giff., 460.
[3] Phipps *v.* Lovegrove, L. R., 16 Eq., 80.
[4] Smith *v.* Bolden, 33 Beav., 262.
[5] Lewin, 7th Edn., 317, citing Livesay *v.* O'Hara, 14 Ir. Ch. Rep., 12.

right, to the establishment of which that fact is essential.[1] According to Hindu law, there must be a lapse of twelve years before death will be presumed.[2]

Rebuttal of presumption.

The presumption does not arise when the probability of intelligence is rebutted by circumstances.[3] Should the person afterwards re-appear in fact, he may assert his right.[4] And therefore, if the trust-fund is in Court and it is paid out to a claimant, he must give security to refund in such a case.[5] A trustee should, therefore, either accumulate the fund until death is proved, or else require an indemnity from the person to whom he pays.

Release.

When a trustee or executor hands over the trust-funds to a *cestui que trust*, it is usual to obtain a receipt or acknowledgment in full discharge of all claims. But such a receipt only discharges in respect of those claims which were actually known, and if given in ignorance of the real facts, will not affect the right of the *cestui que trust*.[6]

Liability for payment to wrong persons.

If a trustee, executor, or administrator pays over the trust-fund to persons who are not properly entitled to it, he will, as a general rule, be liable to those persons who can prove their title to it, even though he has acted honestly and circumspectly, and has been misled by his legal advisers. "I have no doubt," said Lord Redesdale,[7] "that the trustees meant to act fairly and honestly; but they were misadvised; and the Court must proceed, not upon the improper advice under which an executor may have acted, but upon the acts which he has done. If under the best advice he could procure he acts wrong, it is his misfortune; but public policy requires that he should be the person to suffer."[8] But ignorance of facts may, under certain circumstances, excuse the trustees.[9]

[1] *In re* Phené's Trusts, L. R., 5 Ch., 139: and see Nepean *v. Doe*, 2 M. and W., 894; Dunn *v.* Snowden, 2 Dr. and Sm., 201; Lamb *v.* Orton, 6 Jur., N. S., 61; Sillick *v.* Booth, 1 Y. and C. C. C., 117; Hickman *v.* Upsall, L. R., 20 Eq., 136. Act I of 1872, ss. 107, 108.

[2] Janmajay Mazumdar *v.* Keshab Lal, 2 B. L. R, A. C., 134; Sarada Sundari Debi *v.* Gobind Mani, *ib.*, 137 (*n*).

[3] Bowden *v.* Henderson, 2 Sm. and G., 360.

[4] Lewin, 7th Edn., 319, citing Woodhouselee *v.* Dalrymple, 9 W. R. (Eng), 475; Monckton *v.* Braddell, L R., 7 Eq., 30.

[5] Dowley *v.* Winfield, 14 Sim., 277; Cuthbert *v.* Purrier, 2 Phillips, 199.

[6] Eaves *v.* Hickson, 30 Beav., 143: see further Lewin, 7th Edn., 326.

[7] Doyle *v.* Blake, 2 Sch. and Lef., 243.

[8] And see Urch *v.* Walker, 3 M. and C., 705; Turner *v.* Maule, 3 DeG. and Sm., 497; *In re* Knight's Trusts, 27 Beav., 49.

[9] *Ex parte* Norris, L. R., 4 Ch., 287.

LECTURE VII.

Costs.

Where the trustees have acted *bonâ fide* and under legal advice, they will not be made to pay costs.[1] As a rule, costs follow the event, and if a plaintiff fails, he has to pay the costs of the suit. But the Court has jurisdiction to allow an unsuccessful plaintiff his costs. And if it appears upon the construction of the instrument of trust that the rights of parties were so exceedingly doubtful that the fund could not safely be distributed without the opinion of the Court, an unsuccessful claimant may be allowed his costs out of the fund.[2] Where, however, a suit was instituted for the administration of an estate by a person entitled to a contingent reversionary interest, and a decree for an account was obtained, but before the accounts could be taken his interest wholly failed, he was held not to be entitled to his costs either as against the defendants or out of the fund.[3]

But trustees are not justified by remaining passive, in preventing the rightful owners from obtaining possession of their property, and if called upon to do an act involving no risk or responsibility, which is necessary to enable the true owner to obtain his property, they are bound to do it; and if their refusal renders an application to the Court necessary, they will be made to pay the costs.[4]

Interest.

An executor or trustee who in good faith pays over trust-money to persons who are not entitled to it, may be ordered to refund, but he will not have to pay interest.[5] If interest has been paid by mistake, it cannot be recovered back, but such wrongful payment cannot affect the title to the capital.[6]

Bond of indemnity.

"In cases where there exists a mere shadow of doubt as to the rights of parties interested, and it is highly improbable that any adverse claim will, in fact, be ever advanced, the protection of the trustee may be provided for by a substantial bond of indemnity. In general, however, a bond of indemnity is a very unsatisfactory safeguard, for

[1] Angier *v.* Stannard, 3 M. and K., 566; Devey *v.* Thornton, 9 Hare, 232; Field *v.* Donoughmore, 1 Dr. and War., 234.

[2] Lynn *v.* Beaver, T. and R., 63; Westcott *v.* Culliford, 3 Hare, 274: Turner *v.* Frampton, 2 Coll., 336; Wedgwood *v.* Adams, 8 Beav., 103; Boreham *v.* Bignall, 8 Hare, 134; Merlin *v.* Blagrave, 25 Beav., 134.

[3] Hay *v.* Bowen, 5 Beav., 610.

[4] *In re* Primrose, 23 Beav., 590.

[5] Saltmarsh *v.* Barrett, 31 Beav., 349.

[6] Remnant *v.* Hood, 2 DeG. F. and J., 404: see *Ex parte* Ogle, L. R., 8 Ch., 711.

when the danger arises, the obligors are often found insolvent, or their assets have been distributed. And if the bond be to indemnify against a breach of trust, the Court is not disposed to show mercy towards a trustee who admits himself to have *wilfully* erred by having endeavoured to arm himself against the consequences."[1]

Authority from *cestui que trust* to receive the money.

"Where the trustee is satisfied as to the parties rightfully entitled, he may pay the money either to the parties themselves, or to an agent empowered by them to receive it; and the authority need not be by power-of-attorney, or by deed, or even in writing. The trustee is safe if he can prove the authority, however communicated. But a trustee would not be acting prudently if he parted with the fund to an agent without some document producible at any moment by which he could establish the fact of the agency."[2]

Payment on written authority.

If trustees pay on a written authority, they must be careful to see that it is genuine; for if it turns out to be forged, they will be liable for the loss. "Trustees," said Lord Northington,[3] "whether private persons or a body corporate, must see to the reality of the authority empowering them to dispose of the trust-money, for if the transfer is made without the authority of the owner, the act is a nullity, and in consideration of law and equity the rights remain as before." In that case a bank had permitted a transfer of stock under a forged power-of-attorney. "The question is," said Lord Romilly,[4] "where forgery is committed, and a person wrongfully gets trust-money which cannot be recovered from him, on whom is the loss to fall? I am of opinion that it falls on the person who paid the money. Here the loss falls on the trustees, and the persons to whom the fund really belongs are not to be deprived of it. The trustee is bound to pay the trust-fund to the right persons." In this case the trustees had paid over the trust-fund to wrong parties upon a forged authority, and they were held to be liable; but the persons who had wrongfully received the money were ordered to repay the amount they had respectively received in order to relieve the trustees.[5]

[1] Lewin, 7th Edn., 320. [2] *Ibid*, 322.

[3] Ashby *v.* Blackwell, 2 Eden, 302: and see Sloman *v.* The Bank of England, 14 Sim., 475. [4] Eaves *v.* Hickson, 30 Beav., 141.

[5] See also Bostock *v.* Floyer. L. R., 1 Ch., 26: Hopgood *v.* Parkin, L. R., 11 Eq., 75; Sutton *v.* Wilders, L. R., 12 Eq., 373.

LECTURE VII.

Payment to persons under disability.

If trustees are induced by fraud to pay to an infant, they will not be liable to pay over again to him when he comes of age.[1]

Partners.

In the case of the death of a partner, a debt owing to the firm may safely be paid to the surviving partners, who are competent to give receipts in respect of joint debts.[2]

Payment to single trustee.

"The Court will not, in the exercise of its discretion, except under special circumstances, pay out money to a single trustee who has survived his co-trustees, and a *trustee* out of Court would do well to throw all the protection he can about a trust-fund; but it must not be inferred that he would not be *safe* in paying to a single surviving trustee, for payment to a surviving trustee for sale, is of constant occurrence."[3]

Over-payment.

If trustees under an erroneous view of the effect of the instrument of trust have overpaid *cestuis que trustent*, the Court will compel a restitution and repayment, and will give the trustees a lien on other interests of such *cestuis que trustent*, even as against an assignee for valuable consideration.[4] And one *cestui que trust* may sue the *cestui que trust* who has been overpaid, to recover the amount notwithstanding the Limitation Act, if there have been no improper *laches* on his part.[5]

Where in a suit against a trustee for relief in respect of a breach of trust it appears that overpayments have been made, they may be recovered in the suit without instituting fresh proceedings.[6]

Refund to executor.

Legatees will not, generally, be made to refund, at the the suit of other legatees, payments voluntarily made to them by the executors under a mistake, but the repayment will be ordered to be made out of any undistributed funds in which they may be interested,[7] especially they will not be made to refund when they were not willing parties to the payment, and a long period has since

[1] Overton *v.* Banister, 3 Hare, 503; Wright *v.* Snowe, 3 DeG. and Sm., 321; Nelson *v.* Stocker, 4 DeG. and J., 458. As to payments to married women and lunatics, see Lewin, 7th Edn., 323, 324.

[2] Philips *v.* Philips, 3 Hare, 289.

[3] Lewin, 7th Edn., 324.

[4] Dibbs *v.* Goren, 11 Beav., 483; Livesey *v.* Livesey, 3 Russ., 287.

[5] Harris *v.* Harris, 29 Beav., 110; Prowse *v.* Spurgin, L. R., 5 Eq., 99; Jervis *v.* Wolferstan, L. R., 18 Eq., 18.

[6] Hood *v.* Clapham, 19 Beav., 90; Baynard *v.* Woolley, 20 Beav., 583; Davies *v.* Hodgson, 25 Beav., 177; Griffiths *v.* Porter, *ib.*, 236.

[7] Downes *v.* Bullock, 25 Beav., 54.

elapsed.[1] And it appears that a purchaser of a legacy cannot be called upon to refund or pay any portion of a debt subsequently established against the testator's estate.[2]

Where an executor administered an estate and paid over the residue, and ten years after a creditor of the testator brought an action of covenant against the executor, who instituted proceedings to administer the estate, and to make legacies standing in the joint names of the executor and legatees applicable to the payment of the debt,—the Court ordered the debt to be paid out of the legacies, but refused to allow the executor his costs.[3]

Notice of a remote contingent liability on the part of a testator is not sufficient to prevent his executor from distributing his residuary estate; and if the executor distributes with such notice, and the liability afterwards ripens into a debt, he will be entitled to call upon the residuary legatees to refund.[4]

Where one of several residuary legatees or next-of-kin has received his share of the estate of a testator or intestate, the others cannot call upon him to refund if the estate is subsequently wasted; but they can do so if the wasting took place before such share was received. And in the latter case, the burden of proof lies on those who call upon the residuary legatee or next-of-kin to refund, to show that the wasting took place before the share was paid over.[5]

Payment when debt from testator subsisting.

It is a breach of trust on the part of executors or trustees to pay residuary legatees while their testator's debts remain unpaid, and creditors whose debts are not Statute-barred may recover the amount from the legatees,[6] but they cannot recover from a purchaser for value.[7]

Liability of trustee for breach of trust.

If through the acts, or default of the trustees, the trust-property is damaged, the *cestuis que trustent* are entitled to sue the trustees for compensation for the loss which has been sustained, and the trustees will be liable to make good such loss personally.[8]

[1] Bate *v.* Hooper, 5 D. M. G., 345.
[2] Noble *v.* Brett, 24 Beav., 499.
[3] Noble *v.* Brett, 24 Beav., 499; 26 Beav., 233.
[4] Jervis *v.* Wolferstan, L. R., 18 Eq., 18.
[5] Peterson *v* Peterson, L. R., 3 Eq., 111.
[6] Fordham *v.* Wallis, 10 Hare, 217.
[7] Dilkes *v.* Broadmead, 2 D. F. & J., 566; Ridgway *v.* Newstead, 3 D. F & J., 474
[8] Syed Khodabunda Khan *v.* M. S. Oomutul Fatima, 13 S. D. A., 235; Moonshee Buzzul Ruhim *v.* Shumsheroon-nissa Begum, W. R. (F.B.), 60.

LECTURE VII.

A trustee is liable for a breach of trust, even though there was no consideration and the trustee himself is the author of the trust.[1] And if any person assumes to act as a trustee, and in so doing injures the trust-fund, he will be responsible, though he was never properly appointed.[2]

Trustee liable, though he has not benefited.

The Court does not inquire whether the trustee has gained any particular benefit; but fastens upon him an obligation to make good the situation of the *cestui que trust*.[3] "It has been the constant habit of Courts of Equity," said Lord Redesdale,[4] "to charge persons in the character of trustees with the consequences of a breach of trust, and to charge their representatives also, whether they derive benefit from the breach of trust or not."[5]

Extent of liability.

A trustee will not be charged, as a mortgagee, for what he has or might have received;[6] he will not be charged with imaginary values,[7] for he is a mere stake-holder.[8] But if there is wilful default,[9] or very supine neglect,[7] he may be charged with more than he received, but the proof must be very strong.[7]

Trustee about to abscond.

If the trustee is about to abscond, the *cestui que trust* may apply under chap. XXXIV of the Code of Civil Procedure that the trustee may give security, and the Court may, if it thinks fit, issue a warrant to arrest the trustee and bring him before the Court to show cause why he should not give security for his appearance. The Court would probably only exercise its jurisdiction under this chapter if the *cestui que trust* had a vested interest, and would not interfere where the *cestui que trust's* interest was contingent. A present vested interest, though capable of being divested, would be sufficient.[9]

Criminal breach of trust.

If a trustee dishonestly misappropriates or converts trust-property to his own use, or dishonestly uses or disposes of that property in violation of any direction of

[1] Drosier *v.* Brereton, 15 Beav., 221.

[2] Rackham *v.* Siddal, 16 Sim., 297; 1 Mac. & G., 607; Life Association of Scotland *v.* Siddal, 3 DeG. F. & J., 58; Aveline *v.* Melhuish, 2 DeG. J. & S., 288; Hennessey *a.* Bray, 33 Beav., 96.

[3] Dornford *v.* Dornford, 12 Ves., 129.

[4] Adair *v.* Shaw, 1 Sch. & Lef., 272.

[5] See also Raphael *v.* Boehm, 13 Ves., 411, 490; Moons *v.* De Bernales, 1 Russ., 305; Lord Montford *v.* Lord Cadogan, 17 Ves., 489.

[6] Harnard *v.* Webster, Sel. Ch. Ca., 53.

[7] Palmer *v.* Jones, 1 Vern., 144.

[8] Pybus *v.* Smith, 1 Ves. J., 193.

[9] See Howkins *v.* Howkins, 1 Dr. & Sm., 75.

law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, he commits criminal breach of trust (Act XLV of 1860, s. 405), and is liable to be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both (s. 406). And the Code contains provisions (ss. 407, 408, 409) regarding criminal breach of trust by a carrier, wharfinger, or warehouse-keeper; clerks or servants, public servants, bankers, merchants, or agents. At one time it was held in England, that a trustee could not be punished for stealing the trust-property, as he is, according to English law, the legal owner, and a man cannot steal his own property. This absurdity has, however, been done away with by 24 and 25 Vict., c. 96, ss. 80, 86; and a trustee in England is now liable criminally as well as civilly.

A refusal to give up land alleged to have been mortgaged, the mortgage having been denied, cannot be treated as a dishonest misappropriation of documents of title amounting to a criminal breach of trust under s. 405.[1]

Liability of professional adviser.

If a professional adviser wilfully advises a breach of trust, he will be liable to be suspended from practice.[2] And a trustee, also a professional man, who commits a breach of trust, is liable to the same penalty.[3] But the breach must be wilful; and a professional man acting under instructions from the trustees, will not, as we have seen, be liable as a constructive trustee, unless he is aware of the intended breach of trust.[4]

Partner.

If a trustee is a member of a firm, and pays trust-moneys into the partnership account, the other partners will be liable for any loss occasioned by the breach of trust;[5] and if one of a firm of solicitors in transacting business with trustees practises a fraud upon the trustees, the co-partners are liable.[6]

Loss by accident.

If trustees neglect to take possession of the trust-property, and to put it in position of security, they have committed

[1] *Reg. v.* Jaffir Naik, 2 Bom. H. C. R., 133.
[2] Goodwin *v.* Gosnell, 2 Coll., 457.
[3] *In re* Chandler, 22 Beav., 253.
[4] Barnes *v.* Addy, L. R., 9 Ch., 244.
[5] Eager *v.* Barnes, 31 Beav., 579.
[6] Lewin, 7th Edn., 770.

LECTURE VII.

a breach of trust, and will be liable for loss, even by fire, lightning, or any other accident.[1]

Neglect to obey directions in instrument of trust.

If a trustee neglects to follow a direction to accumulate dividends,[2] to enforce a transfer of stock,[3] or to sell, and in consequence the property becomes deteriorated in value, he will be liable for any loss that may happen.[4] So, if he neglects to register or to execute a power which it was his duty to execute, he will be liable for loss.[5]

To pay premiums.

If a trustee suffers a policy of insurance to become forfeited through neglect to pay the premiums, he is bound to make good the loss to the *cestui que trust*.[6] But if a trustee has no funds in hand, he will not be liable.[7] If he advances the premiums himself, he will have a lien on the policy.[8] If there are no means of keeping up the policy, the Court will direct it to be sold.[9]

Sale to purchaser for valuable consideration without notice.

If a trustee has wrongfully sold the trust-estate to a purchaser for valuable consideration without notice, the *cestui que trust* may either compel the trustee to purchase other lands of equal value, which lands will be held upon the trusts originally provided,[10] or he may take the proceeds of the sale with interest, or the present estimated value of the lands sold, after deducting any increase of price caused by subsequent improvements.[11]

Agent.

As a rule, an agent appointed by a trustee cannot be made accountable for any losses incurred by him while acting as agent.[12] If, however, he goes beyond his authority as an agent, and loss ensues, he will be liable as a constructive trustee.[13] The trustees are responsible for the acts of their agents, and must be made parties to a suit to recover moneys lost by the agent.[14]

[1] Caffrey *v.* Darby, 6 Ves., 496: see also Cocker *v.* Quayle, 1 R. & M., 535; Fyler *v.* Fyler, 3 Beav., 568; Kellaway *v.* Johnson, 5 Beav., 324; Munch *v.* Cockerell, 5 M. & Cr., 212; Gibbins *v.* Taylor, 22 Beav., 344.

[2] Pride *v.* Fooks, 2 Beav., 430.

[3] Fenwick *v.* Greenwell, 10 Beav., 412.

[4] Devaynes *v.* Robinson, 24 Beav., 86; Sculthorpe *v.* Tipper., L. R., 13 Eq., 232; *In re* Norrington, L. R., 13 Ch. Div., 664.

[5] Lewin, 7th Edn., 771.

[6] Lewin, 7th Edn., 771, citing Marriott *v.* Kinnersley, Taml., 470.

[7] Hobday *v.* Peters (No 3), 28 Beav., 603: see, however, Kingdon *v.* Castleman, 46 L. J., Ch., 448.

[8] Clack *v.* Holland, 29 Beav., 273.

[9] Hill *v.* Teenery, 23 Beav., 16.

[10] See Lewin, 7th Edn., 770. [11] *Ibid.*

[12] Morgan *v.* Stephens, 3 Giff., 235; Marshall *v.* Sladden, 7 Hare, 428.

[13] Morgan *v.* Stephens, 3 Giff., 235; Hardy *v.* Caley, 33 Beav., 365.

[14] Robertson *v.* Armstrong, 28 Beav., 123.

A firm of solicitors having been employed by the trustees of a will to receive the proceeds of the testator's real estate which had been taken by a Railway Company, paid over the money to one of such trustees without the receipt or authority of the other. The money having been lost to the estate by the insolvency and death of the trustee to whom it was paid, it was held, that the receipt of one trustee only (though also an executor) was not a sufficient discharge to the solicitors for the money which they had received by the authority of the two, and that they were personally liable to make good the loss which had resulted to the trust-estate from such improper payment.[1]

The tendency of recent decisions is to avoid making an agent responsible, unless there has been dishonest knowledge on his part. In *Barnes* v. *Addy*[2] Lord Selborne, L.C., said: "It is equally important to maintain the doctrine of trusts which is established in this Court, and not to strain it by unreasonable construction beyond its due and proper limits. There would be no better mode of undermining the sound doctrines of equity than to make reasonable and inequitable applications of them.

Barnes v. Addy.

"Now in this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust-property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers—transactions, perhaps, of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust-property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees. Those are the principles, as it seems to me, which we must bear in mind in dealing with the facts of this case. If those principles were disregarded, I know not how any one

[1] Lee v. Sankey, L. R., 15 Eq., 204. [2] L. R., 9 Ch., 251.

LECTURE VII.

could, in transactions admitting of doubt as to the view which a Court of Equity might take of them, safely discharge the office of solicitor, of banker, or of agent of any sort to trustees. But on the other hand, if persons dealing honestly as agents are at liberty to rely on the legal power for the trustees, and are not to have the character of trustees constructively imposed upon them, then the transactions of mankind can safely be carried through; and I apprehend those who create trusts do expressly intend, in the absence of fraud and dishonesty, to exonerate such agents of all classes from the responsibilities which are expressly incumbent by reason of the fiduciary relation, upon the trustees."

Limitation.

Limitation cannot be pleaded as a bar to a suit for compensation for breach of trust, where the trust is express. Section 10 of Act XV of 1877 provides, that "no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands, such property shall be barred by any length of time." These words mean, that where a trust has been created expressly for some specific purpose or object, and property has become vested in a trustee upon such trust (either from such person having been originally named as trustee, or having become so subsequently by operation of law), the person or persons who for the time being may be beneficially interested in that trust, may bring a suit against such trustee to enforce that trust at any distance of time, without being barred by the law of limitation.[1] The words 'in trust for a specific purpose' are intended to apply to trusts created for some defined or particular purpose or object as distinguished from trusts of a general nature, such as the law imposes upon executors or others who hold recognized fiduciary positions; they are used in a restrictive sense to limit the character or nature of the trust attaching to the property which is sought to be followed.[2]

In this country, suits between a *cestui que trust* and trustee for an account are governed solely by the Limitation Act; and unless they fall within the exemption of

[1] Kherodemoney Dossee *v.* Doorgamoney Dossee, I. L. R., 4 Calc., 465, *per* Garth, C. J.

[2] Greender Chunder Ghose *v.* Mackintosh, I. L. R., 4 Calc., 897: see Lewin, 7th Edn., 769.

s. 10, are liable to become barred by some one or other of the articles in the second schedule of the Act. To claim the benefit of that section, a suit against a trustee must be for the purpose of following the trust-property in his hands. If the object of the suit is not to recover any property *in specie*, but to have an account of the defendant's stewardship, which means an account of the moneys received and disbursed by the defendant on the plaintiff's behalf, and to be paid any balance which may be found due to him upon taking the account, it must be brought within six years from the time when the plaintiff had first a right to demand it.[1]

In 1860, certain shares in a company then formed were allotted to *S.*, on the understanding, as the plaintiff alleged, that 120 of such shares should, on the amount thereof being paid to *S.*, be transferred to, and registered in the books of, the company in the names of the plaintiffs. In 1862, the plaintiffs completed the payment to *S.* in respect of the shares, and during his lifetime, received dividends in respect of the shares. *S.* died in 1870 leaving a will, probate of which was granted to the defendant as his executor. In a suit brought by the plaintiffs, after demand of the shares from the defendant, and refusal by him to deliver them, to compel the defendant to transfer the shares to the plaintiffs, and register the same in their names, the plaintiffs' case was, that the shares had been held in trust for them, and that, consequently, their suit was not barred by lapse of time. It was held, that the transaction between *S.* and the plaintiffs did not amount to "a trust for a specific purpose."[2]

Wilful default.

It is a general rule that a plaintiff cannot have any relief for which no case has been made on the pleadings,[3] and, therefore, if a *cestui que trust* sues his trustee for an account, and the plaintiff seeks relief against wilful default, he must in his pleadings allege some specific act of wilful default and pray for consequential relief,[4] and he must prove at least one act of wilful neglect and default.[5]

[1] Saroda Pershad Chattopadhya *v.* Brojo Nath Bhuttacharjee, I. L. R., 5 Calc., 910.
[2] Ahmed Mahomed Patel *v.* Adjein Dooply, I. L. R., 2 Calc., 323.
[3] Mayer *v.* Murray, 47 L. J., Ch., 606.
[4] Lewin, 7th Edn., 772.
[5] Sleight *v.* Lawson, 3 K. & J., 292.

LECTURE VII.

If at the hearing no act of wilful default is proved, and on taking the ordinary accounts, documents are discovered which might have shown wilful default, the Court will not direct any further inquiry as to wilful default.[1] But if the plaintiff pray an account with interest, and at the original hearing an account is directed, and in the course of the accounts improper balances appear to have been retained, interest on the balances may be asked for at the hearing on further directions.[2] And if relief against a breach of trust be prayed, and at the original hearing the usual accounts only are directed, but with an enquiry who are the parties interested, it is not too late to ask relief against the breach of trust on further directions, as before that time the Court was not in a condition to deal with the question.[3]

And in a redemption-suit it is not necessary that the plaintiff should charge wilful default; nor is the case altered, if the deed, though in substance a security, be in the form of a deed of trust.[4] A mortgagor can always have an account of rents and profits which a mortgagee in possession might, but for his wilful default, have received, though no charge of wilful default has been made, the reason being, that the Court looks with less favour on the case of a mortgagee in possession than on that of a mere gratuitous trustee.[5]

Concurrence.

If the *cestuis que trustent* are persons who are competent to contract,[6] and they have assented to the wrongful act on the part of the trustees, the Court will endeavour to deliver the trustees from their liability to make good any loss,[7] and the *cestuis que trustent* will have to bear it. If some of the *cestuis que trustent* are not competent to contract, the loss will be thrown, in the first instance, upon those who were *sui juris* and who consented to the breach of trust, but the trustees will remain liable to make up any deficiency. "The rule of the Court in all cases is, that if a trustee errs in the management of the trust, and is guilty of a breach of trust, yet if he goes out of the trust with the approbation of the beneficiary, it must first be made good out of the estate of the person who

[1] Coope *v.* Carter, 2 D. M. G., 292: and see *Re* Fryer, 3 K. & J., 317; Partington *v.* Reynolds, 4 Drew., 253; *Re* Delevante, 6 Jur., N. S., 118; Brooker *v.* Brooker, 3 Sm. & Giff., 475.

[2] Lewin, 7th Edn., 772. [3] *Ibid.* [4] *Ibid*, 773.

[5] Mayer *v.* Murray, 47 L. J., Ch., 606. [6] See Lewin, 7th Edn., 783.

[7] See Aganoor *v.* Hogg, Boul., 38; Brice *v.* Stokes, 11 Ves., 324; Thompson *v.* Linch, 22 Beav., 324; 8 D. M. G., 560.

consented to it."[1] And the Court will enquire whether and when the *cestui que trust* had notice of the breach of trust.[2] No man, having a right to require the performance of a duty, who becomes a party to the delay in the performance of it, can complain of any consequences which may arise from such delay. There is a marked distinction between the degree of knowledge and sanction necessary for the purpose of exonerating a trustee from that which was clearly a breach of trust, and that which is necessary to preclude the *cestui que trust* from complaining of that not being done, the omission to do which, with the concurrence of the *cestui que trust*, never constituted a breach of trust. In the first case, it is used to release a right and discharge an obligation already perfected by the breach of trust; in the latter, only to prevent a right from arising from the non-performance of a duty which it was competent for the *cestui que trust* to dispense with.[3] "It is established by all the cases," said Lord Eldon,[4] "that if the *cestui que trust* joins with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust. I go further, and agree, that either concurrence in the act, or acquiescence without original concurrence, will release the trustees; but that is only a general rule, and the Court must inquire into the circumstances which induced concurrence or acquiescence; recollecting in the conduct of that inquiry, how important it is, on the one hand, to secure the property of the *cestui que trust*, and on the other, not to deter men from undertaking trusts, from the performance of which they seldom obtain either satisfaction or gratitude."

Where trustees allowed property settled upon the marriage of a lady to remain uninvested in the hands of one of their co-trustees, the lady being aware of the facts, and the trustee with whom the money was, subsequently became insolvent, it was held, that the co-trustees had been guilty of a breach of trust, but that the lady was debarred by acquiescence from obtaining any relief from them.[5]

[1] Trafford *v.* Boehm, 3 Atk., 444, *per* Lord Hardwicke; Lord Montford *v.* Lord Cadogan, 17 Ves., 485; 19 Ves., 635; Booth *v.* Booth, 1 Beav., 130.
[2] Broadhurst *v.* Balguy, 1 Y. & C. C. C., 16.
[3] Munch *v.* Cockerell, 5 My. & Cr., 207, 218.
[4] Walker *v.* Symonds, 3 Swanst., 1, 64.
[5] Jones *v.* Higgins, L. R., 2 Eq., 538.

LECTURE VII.

Fraud by trustees.

By *cestui que trust.*

If the trustees have induced the *cestuis que trustent* to assent to the breach of trust by fraud, their liability will, of course, remain unaltered.[1]

If *cestuis que trustent,* who are not competent to contract, fraudulently induce their trustees to commit a breach of trust, they are debarred from afterwards calling upon the trustees to make good any loss.[2]

Acquiescence.

Cestuis que trustent may debar themselves from obtaining relief in respect of a breach of trust either by direct acquiescence in the act,[3] or else by standing by and allowing the wrongful act complained of to be done without objection.[4]

The term acquiescence will have different significations attached to it, according to whether the acquiescence alleged, occurs while the act acquiesced in is in progress, or only after it has been completed. "If," said Thesiger, L. J.,[5] "a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as Lord Cottenham said in *The Duke of Leeds* v. *Earl of Amherst,*[6] is the proper sense of the term 'acquiescence,' and in that sense may be defined as quiescence, under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him which, at all events, as a general rule, cannot be divested without accord and satisfaction or release under seal. Mere submission to the injury for any time short of the period limited by Statute for the enforcement of the right of

[1] Walker *v.* Symonds, 3 Swanst., 1.

[2] See Lewin, 7th Edn., pp. 783—6, and *ante*, p. 128.

[3] Styles *v.* Guy, 1 Mac. and G., 427; Graham *v.* Birkenhead Railway Co., 2 Mac. and G., 156; Kent *v.* Jackson, 14 Beav., 384.

[4] Duke of Leeds *v.* Earl of Amherst, 2 Phillips, 123; Phillipson *v.* Gatty, 7 Hare, 523; Stafford *v.* Stafford, 1 DeG. and J., 202; Jorden *v.* Money, 5 H. L. C., 185; Rennie *v.* Young, 2 DeG. and J., 136.

[5] De Bussche *v.* Alt, L. R., 8 Ch. Div., 314. [6] 2 Phill., 47, 123.

action, cannot take away such right, although under the name of laches it may afford a ground for refusing relief under some particular circumstances; and it is clear that even an express promise by the person injured that he would not take any legal proceedings to redress the injury done to him, could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding."[1]

Delay.

In order that acquiescence may be successfully pleaded as a bar to a suit for relief in respect of a breach of trust, there must have been such delay as amounts to laches on the part of the *cestui que trust.* No precise time can be fixed, but delay for twenty years will disentitle the *cestui que trust* to relief.[2] The onus lies on the party relying on acquiescence to prove the facts from which the consent of the *cestui que trust* is to be inferred.[3] It is not the business of a *cestui que trust* to inform a trustee of his duty, and a *cestui que trust* will not, therefore, be barred on the ground of acquiescence, because he has not made enquiries which, if made, would have brought the fact that a breach of trust had been committed to his knowledge.[4] Nor will he be bound by accepting some portion of his claim before suit.[5] A *cestui que trust,* whose interest is reversionary, is apparently not bound to take proceedings to rectify a breach of trust, and will not be barred by acquiescence because he does not promptly act. "Length of time," said Turner, L. J.,[6] "where it does not operate as a statutory or positive bar, operates, as I apprehend, simply as evidence of assent or acquiescence. The two propositions of a bar by length of time and by acquiescence are not, as I conceive, distinct propositions. They constitute but one proposition, and that proposition, when applied to a question of this description, is, that the *cestui que trust* assented to the breach of trust. A *cestui que trust,* whose interest is reversionary, is not bound to assert his title until it comes into possession, but the mere circumstance that he is not bound to assert his title, does

[1] And see Lewin, 7th Edn., 736.

[2] Thomson *v.* Eastwood, L. R., 2 App. Cas., 236, *per* Lord Cairns.

[3] Life Association of Scotland *v.* Siddal, 3 DeG. F. and J., 77, *per* Lord Campbell, L. C.

[4] Thompson *v.* Finch, 22 Beav., 325; 8 D. M. G., 560; Life Association of Scotland *v.* Siddal, 3 DeG. F. and J., 73.

[5] Thompson *v.* Finch, 22 Beav., 316; 8 D. M. G., 560.

[6] Life Association of Scotland *v.* Siddal, 3 DeG. F. and J., 72.

LECTURE VII.

not seem to me to bear upon the question of his assent to a breach of trust. He is not, so far as I can see, less capable of giving such assent when his interest is in reversion than when it is in possession. Whether he has done so or not, is a question to be determined on the facts of each particular case." . . . "I am not prepared to say that where the trust is definite and clear, a breach of trust can be held to have been sanctioned or concurred in, by the mere knowledge and non-interference on the part of the *cestui que trust* before his interest has come into possession." It is almost impossible to attribute laches to a person whose interest is reversionary, because he does not sue before it vests in possession.[1] But knowledge of the facts may and ought, in some cases, to be presumed from great lapse of time.[2]

Release and confirmation.

Cestuis que trustent, who are competent to contract, may release their trustees from liability to account for a breach of trust, or they may confirm the transaction, in either of which cases they will be debarred from proceeding against the trustees.[3]

If, however, the transaction in respect of which the release is given is null and void, the release will not bar the *cestui que trust*.[4]

A *cestui que trust* who releases the principal in a fraud cannot go on against the other parties, though they would have been secondarily liable.[5]

In order that *cestuis que trustent* may be debarred from obtaining relief in respect of a breach of trust on any of the grounds which I have mentioned, they must be competent to contract, must have full information of all the facts relating to the breach of trust, must be aware of the relief to which they would be entitled in a Court of Equity, and must not have acted under compulsion. A *cestui que trust* who has lately come of age should have independent legal advice.[6]

No set-off in respect of breach of trust.

A trustee, who is liable for a loss occasioned by a breach of trust in respect of one portion of the trust-property, cannot set-off against his liability, a gain which has accrued

[1] Taylor *v.* Cartwright, L. R., 14 Eq., 176.
[2] Life Association of Scotland *v.* Siddal, 3 DeG. F. and J., 77.
[3] French *v.* Hobson, 9 Ves., 103; Wilkinson *v.* Parry, 4 Russ., 272; Aylwin *v.* Bray, 2 Y. and J., 518 (*n*); Cresswell *v.* Dowell, 4 Giff., 465.
[4] Thomson *v.* Eastwood, L. R., 2 App. Cas., 215.
[5] Thomson *v.* Harrison, 2 Bro. C. C., 164.
[6] See Lewin, 7th Ed., pp., 789, 790.

to another portion of the trust-property through another and distinct breach of trust. "When there are two separate funds, subject to trusts," said Kindersley, V. C.,[1] "and the trustees commit a breach of trust as to one, by which it is lost, I think it is impossible to permit the trustees to say 'we have improved the other fund, and that fund is bound to make up the loss on the other.' That I cannot hold. If the trustees have lost one part of the settled funds, they must answer for it, whatever may be the improvement of the other part."[2]

Liability for breach of trust by predecessor or co-trustees.

One trustee is not as such liable for a breach of trust committed by his predecessor,[3] or by his co-trustee. The leading case upon this point is *Townley* v. *Sherborne*,[4] where it was resolved by all the Judges, "that where lands or leases were conveyed to two or more upon trust, and one of them receives all, or the most part of the profits, and after dieth or decayeth in his estate, his co-trustees shall not be charged, or be compelled in this Court (the Court of Chancery) to answer for the receipts of him so dying or decayed, unless some practice, fraud, or evil dealing appear to have been in them to prejudice their trust; for they being by law joint tenants or tenants-in-common, every one by law may receive either all or as much of the profits as he can come by, and if two executors be, and one of them waste all, or any part of the estate, the devastavit shall, by law, charge him only, and not his co-executor; and in that case, *equitas sequitur legem*, there having been many precedents that one executor shall not answer, nor be charged for the act or default of his companion.

"And it is no breach of trust to permit one of the trustees to receive all or the most part of the profits, it falling out many times that some of the trustees live far from the lands, and one put in trust out of other respects than to be troubled with the receipt of the profits."[5]

And it was further resolved, that "if, upon the proofs or circumstances, the Court be satisfied that there be *dolus malus*, or any evil practice, fraud, or ill-intent in him that permitted his companion to receive the whole profits, he may be charged though he receive nothing."

[1] Wiles *v.* Gresham, 2 Drew., 258, p. 271.
[2] See also Dimes *v.* Scott. 4 Russ., 195; Fletcher *v.* Green, 33 Beav., 426.
[3] Tebbs *v* Carpenter, 1 Madd., 290.
[4] Bridgman. 35.
[5] Williams *v.* Nixon, 2 Beav., 472.

LECTURE VII.

Trustee joining in receipt for conformity.

It is now settled, overruling the earlier cases, that a trustee who joins with his co-trustees in a receipt for trust-money when it is indispensable that he should do so for conformity, will not, from that act alone, be made liable for any misapplication of the trust-property by his co-trustees into whose hands it comes. "It seems," said Lord Cowper,[1] "to be substantial injustice to decree a man to answer for money which he did not receive, at the same time that the charge upon him by his joining in the receipts is but notional."[2] "When the administration of the trust is vested in co-trustees, a receipt for money paid to the account of the trust must be authenticated by the signature of all the trustees in their joint capacity, and it would be tyranny to punish a trustee for an act which the very nature of his office will not permit him to decline."[3] The trustee who seeks to be discharged from liability, on the ground that he only signed the receipt for conformity, must show that the money acknowledged to have been received by all, was in fact received by the co-trustees, and that he only joined for conformity.[4] A joint receipt will charge trustees *in solido* each, if there is no other proof of the receipt of the money. As if a mortgage is devised in trust to three trustees, and the mortgagor, with his witness, meets them to pay it off; the money is laid on the table, and the mortgagor, having obtained a reconveyance and receipt for his money, withdraws, each trustee is answerable *in solido*.[5]

And where it cannot be distinguished how much was received by one trustee, and how much by the other, each will be charged with the whole; for, in such case, the trustees are to blame for not keeping distinct accounts. It is like throwing corn or money into another's heap, where there is no reason that he who made the difficulty should have the whole; on the contrary, because it cannot be distinguished he shall have no part.[6]

Trustee giving receipt bound to see to investment.

But though a trustee joining in a receipt for conformity may, under certain circumstances, escape liability for loss incurred by the acts of his co-trustee, he will remain liable,

[1] Fellows *v.* Mitchell, 1 P. Wms., 82.
[2] See also Brice *v.* Stokes, 11 Ves., 319; *In re* Fryer, 3 K. and J., 317; and Lewin, 7th Ed., 242, where the cases are collected.
[3] Lewin, 7th Edn., 242.
[4] Brice *v.* Stokes, 4 Ves., 324.
[5] Westley *v.* Clark, 1 Eden, 359.
[6] Fellows *v.* Mitchell, 1 P. Wms., 81.

if he allows the money, for which he has given a receipt, to remain uninvested for a long time,[1] or if he sanctions an improper investment.[2] "Though," said Lord Eldon,[3] "a trustee is safe, if he does no more than authorize the receipt and retainer of the money as far as the act is within the due execution of the power, yet, if it is proved that a trustee, under a duty to say, his co-trustee shall not retain the money beyond the time during which the transaction requires retainer, and says, with his knowledge, and therefore with his consent, the co-trustee has not laid it out according to the trust, but has kept it, or lent it, in opposition to the trust, and the other trustee permits that for ten years together, the question turns upon this—not whether the receipt of the money was right, but whether the use of it, subsequent to that receipt, was right after the knowledge of the trustee, that it had got into a course of abuse . . . As soon as a trustee is fixed with knowledge that his co-trustee is misapplying the money, a duty is imposed upon him to bring it back into the joint custody of those who ought to take better care of it. It is the duty of a trustee who signs a receipt for conformity and allows the trust-money to get into the hands of his co-trustee, to ascertain for what purposes the money is required, and personally to ascertain that it has been duly invested. It is not enough for him to rely upon a statement by the co-trustee that such is the case."[4]

Walker v. Symonds.

The law on the point now under consideration was discussed at some length in *Walker* v. *Symonds*.[5] There a sum of money secured upon a mortgage was assigned to three trustees, Donnithorne, Griffith, and Symonds, upon certain trusts. The mortgage was paid off in 1791, and the proceeds, with the approbation of Griffith and Symonds, came into the hands of Donnithorne, who invested it in securities of the East India Company, which were paid off in 1795. Donnithorne again received the money. The co-trustees allowed Donnithorne to retain the money, taking a bond from him, he promising to give a mortgage over some landed estates belonging to him. This he never did, and died in 1796 insolvent; a bill by the *cestuis que trustent*

[1] Brice v. Stokes, 11 Ves., 319.
[2] Thompson v. Finch, 8 D. M. G., 560.
[3] Brice v. Stokes, 11 Ves., 319.
[4] Hanbury v Kirkland, 3 Sim., 265; Thompson v. Finch, 8 D. M. G., 560.
[5] 1 Swanst., 1.

LECTURE VII.

against Griffith and Symonds, to set aside a compromise of the breach of trust on the ground that it had been fraudulently obtained, was dismissed, Sir William Grant, M. R., considering that the fraud had not been proved. His Honor said, p. 41: "What are the transactions? The money had been properly laid out; it had been paid in without any act of the trustees; the trustees did no act to call in the money or change its situation; they were obliged to receive it; so far they were blameless. It came to Donnithorne's hands, and the trustees were not to blame in letting it come to his hands; but they might have afterwards made themselves responsible, by merely not doing what was incumbent on them; by permitting the money to remain a considerable time in the hands of their co-trustee, they might, without any positive act on their part, have made themselves liable; that will depend on the degree and extent of their *laches* in suffering the money to remain in the hands of the trustee. *Brice* v. *Stokes*[1] proceeds upon the doctrine, that a trustee may become liable by knowing that his co-trustee had the money, and leaving it there. They being authorized to put the money out on mortgage, it would be rather hard to say they were guilty of laches by giving Donnithorne a little time to find a mortgage, taking his bond in the meantime." On appeal the decision of Sir William Grant was reversed, and an enquiry was directed as to the acts of the trustees as to the receipt and placing out of the trust-moneys up to the date of Donnithorne's death. On the case coming on for further directions, Lord Eldon said:[2] "The case comes back with a report stating a clear breach of trust in leaving the trust-fund in the situation represented from 1791 to 1793 and from 1793 to 1795. The report states that the money was laid out with the consent of the trustees, in India bills, payable to Donnithorne; a palpable breach of trust, by placing the fund under his control, secured by little more than a promissory note payable to himself. It was probable that in 1793 he would receive the money, and it would be lodged in his hands,—and I repeat, that although the Court in directing an inquiry will proceed as favourably as it can to trustees who have laid out the money on security from which they cannot with activity recover it, yet no Judge can say that they are not guilty of a breach of trust, if they suffer it to lie out on such a security during

[1] 11 Ves., 319. [2] Page 65.

so long a time.[1] . . . The trustees were guilty of a breach of trust in permitting the money to remain on bills payable to Donnithorne alone, and in leaving the state of the funds unascertained for five years.[2] . . . The Master of the Rolls seems to have thought, that the only breach of trust was taking the bond; that was a breach of trust; but he says, and I think rightly, that if he had not found other grounds for dismissing the bill, inquiry would have been necessary. I agree with the Master of the Rolls, that inquiry might, on the principles of this Court, have discharged the trustees in given circumstances from breach of trust. If, without further participation, they, in 1795, had found that they, being implicated in no breach of trust till that time, had a co-trustee who had been guilty of a shameful violation of his duty, and immediately exerted themselves to obtain from him a mortgage, which was their object at that time, and used their utmost efforts, instead of filing a bill in this Court against him, which, perhaps, might have destroyed his means of giving security, I should have hesitated long before I charged them, if inquiry had satisfied me that for a simple contract debt due to them they had taken a bond and a mortgage, instead of instituting a suit, with the rational hope that by means of the bond and the mortgage they should obtain payment from their co-trustee; in such circumstances, I should readily agree with the Master of the Rolls. But when they take no steps on the arrival of the period at which the bond becomes payable, and choose to communicate to the *cestui que trust* that they have taken a bond, but not what is the effect of it, that is not a communication which can entitle them, in this stage of the cause, to insist on circumstances of which, if inquiry had been directed, they might possibly have availed themselves for their protection."

Trustee joining in act for convenience.

Where a trustee joins in signing a cheque, or does any other act to place money in the hands of his co-trustee, or a person employed by the trustees in a due course of business, for the purpose of being applied in a due execution of the trust, such act being required for the purposes of convenience, and the money be lost, if no case of negligence in not making inquiry as to the proposed application of the

[1] Page 67. [2] Page 71.

LECTURE VII.

money, or looking after the application of the money, be made against the trustee,[1] he will not be liable.[2] "It will be found to be the result of all the best authorities upon the subject," said Lord Cottenham,[3] "that though a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result—however little likely to arise from the course adopted—and however free such conduct may have been from any improper motive. Thus, if he omit to sell property when it ought to be sold, and it be afterwards lost without any fault of his, he is liable;[4] or if he leave money due upon personal security, which, though good at the time, afterwards fails.[5] And the case is stronger if he be himself the author of the improper investment, as upon personal security, or an unauthorized fund. Thus, he is not liable, upon a proper investment in the 3 per cents, for loss occasioned by fluctuations of that fund.[6] But he is for the fluctuations of any unauthorized fund.[7] So, when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been entrusted. Necessity, which includes the regular course of business in administering the property, will, in equity, exonerate the personal representative. But if without such necessity he be instrumental in giving to the person failing possession of any part of the property, he will be

[1] Underwood *v.* Stevens, 1 Mer., 713; Hanbury *v.* Kirkland, 3 Sim., 265; Brice *v.* Stokes, 11 Ves., 319; Hewett *v.* Foster, 6 Beav., 261.

[2] Bacon *v.* Bacon, 5 Ves., 331; Terrell *v.* Matthews, 11 L. J., N. S., Ch., 31; Broadhurst *v.* Balguy, 1 Y. and C. C. C., 28.

[3] Clough *v.* Bond, 3 My. and Cr., 496.

[4] Phillips *v.* Phillips, Freem. Ch. Ca., 11.

[5] Powell *v.* Evans, 5 Ves, 839; Tebbs *v.* Carpenter, 1 Madd., 290.

[6] Peat *v.* Crane, 2 Dick, 499.

[7] Hancom *v.* Allen, 2 Dick, 498; Howe *v.* Earl of Dartmouth, 7 Ves., 137.

liable, although the person possessing it be a co-executor or co-administrator."[1]

Executor joining in receipt for conformity.

Formerly it was considered that an executor joining in a receipt for conformity made himself liable; for there is no necessity for him to do so, as the receipt of one executor is a sufficient discharge, whereas the receipt of one trustee is not.[2] But this rule has since been modified. In *Walker* v. *Symonds*[3] Lord Eldon said: "Without going through all the cases, it is obvious that *primâ facie* there is this distinction between executors and trustees, that one executor can, and one trustee cannot, give a discharge: and it may frequently happen, as in *Brice* v. *Stokes*[4] it actually happened, not only that one trustee cannot give a discharge, but that the instrument of trust provides that there shall be no discharge without an act in which all the trustees join. Executors seem formerly to have been charged on much stricter principles, if they joined unnecessarily, though without taking control of the money; that rule is now altered: whether the alteration is wholesome may be a question. It may be laid down now, as in *Brice* v. *Stokes*,[5] that though one executor has joined in a receipt, yet whether he is liable shall depend on his acting. The former was a simple rule, that joining shall be considered as acting; but in the cases since the rule, that joining alone does not impose responsibility scarcely two Judges agree." And in *Joy* v. *Campbell*[6] Lord Redesdale said: "The distinction seems to be this, with respect to a mere signing, that if a receipt be given for the mere purpose of form, then the signing will not charge the person not receiving; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge; and the true question in all these cases seems to have been, whether the money was under the control of both executors. If it was so considered by the person paying the money, then the joining in the receipt by the executor, who did not actually receive it, amounted to a direction to pay his co-executor;

[1] Langford *v.* Gascoyne, 11 Ves., 333; Lord Shipbrook *v.* Lord Hinchinbrook, 11 Ves., 252; Underwood *v.* Stevens, 1 Mer., 712; Hanbury *v.* Kirkland, 3 Sim., 265.

[2] See Lewin, 7th Edn., 246; and the notes to Townley *v.* Sherborne, 2 Wh. and Tudor, 3rd Ed., 820, where the earlier cases are collected.

[3] 3 Swanst., 63. [4] 11 Ves., 319. [5] *Ibid.*

[6] 1 Sch. and Lef., 341.

LECTURE VII.

for it could have no other meaning. He became responsible for the application of the money just as if he had received it." And in *Doyle* v. *Blake*[1] his Lordship said: "The true consideration in a question of this kind is, whether the executor who merely joins in the receipt had a control, and his joining in the receipt is evidence of that control, although the money was actually received by the other." The principles, therefore, which govern the case of trustees joining for conformity will apparently be applicable, and an executor will not be responsible for joining, so long as he acts subsequently in a proper manner. Thus an executor indorsing a bill of exchange,[2] or joining in a sale of securities[3] in order to enable the co-executor to receive the money, will not be liable in the absence of negligence.

Executor must ascertain that money required.

Executors joining in a transfer to a co-executor upon his representation that the money is required for the payment of debts, must take care to ascertain that the money is really required for that purpose, and will be liable for negligence if it turns out that it was not wanted, or for the portion not applied to that purpose, but not for any portion properly expended. The person to whom the representation is made, has imposed upon him at least ordinary and reasonable diligence to inquire whether the representation is true.[4] In *Lord Shipbrook* v. *Lord Hinchinbrook*,[5] which was a case of this nature, Lord Eldon said: "This case depends upon the principle applicable to trustees. The fund being vested in the names of all the executors, it was necessary that all should join in the act which placed the property in the hands of one of them; and my mind had reached this conclusion, that, as these executors could not be held answerable for the balance, for which their co-executor was to account separately, they had a right to contend, at least, that they should be allowed so much of the fund as had been applied to the purpose to which it ought to have been applied, as they might have been compelled so to apply it. . . . . These executors ought at least to have made some inquiry of their co-executor as to what had been doing in the administration. If, making that inquiry, they were misled, that is a distinct case; but,

[1] 2 Sch. and Lef., 242. [2] Hovey *v.* Blakeman, 4 Ves., 608.
[3] Chambers *v.* Minchin, 7 Ves., 197.
[4] Lord Shipbrook *v.* Lord Hinchinbrook. 11 Ves., 254; Underwood *v.* Stevens, 1 Mer., 712; Hewett *v.* Foster, 6 Beav., 259.
[5] 16 Ves., 477.

making no inquiry, they are satisfied with the information which proves groundless, that he wants the money for the purpose of paying debts. They ought to have inquired how that could be; and though it is not a consequence that they might not place the remainder of the property in his hands, it must surely be at their risk, if they were aware that he had been not acting according to his trust, but grossly violating it."[1]

Executor not liable as such for act of co-executor.

The rule that a trustee as such is not liable for a breach of trust committed by his co-trustee, extends to co-executors.[2] But it is otherwise if he has concurred in the misapplication of the fund.[3] In *Mucklow* v. *Fuller*[4] a trustee, who as executor had proved the will, was held to be liable to make good a loss incurred by his allowing a debt from his co-executor to remain outstanding, although the will contained the usual indemnity-clause. In *Booth* v. *Booth*,[5] a testator bequeathed his estate to his partner Booth and to one Batkin upon trust to invest it for the benefit of his wife and children. Both Booth and Batkin proved the will, and Booth retained the testator's moneys in the trade, and ultimately they were lost. Batkin took no active part in the trusts, but was cognizant of the breach of trust, and took no steps to prevent it. It was held, that he was responsible for the consequences of the breach of trust. "The two executors," said Lord Langdale, "proved the will; they take on themselves the trust and the duty of performing it. From that moment it was their duty to do all that was necessary for the conversion of the estate into money, and to see the dividends duly applied; but Batkin, unfortunately, did not consider that by proving the will he had undertaken any duty, or incurred any responsibility; he says he proved the will in consequence of the request of the widow, who informed him that he would not thereby undertake any duty or be responsible for anything. It is important that it should be well understood that no one can safely act in that manner, and that the law will not permit a party to neglect the duty which by proving the will he has undertaken. I am of opinion that he became

[1] Underwood *v.* Stevens, 1 Mer., 712; Bick *v.* Motley, 2 M. and K., 312; Williams *v.* Nixon, 2 Beav., 472; Hewett *v.* Foster, 6 Beav., 259.

[2] Hargthorpe *v.* Milforth, Cro. Eliz., 318; Riky *v.* Kemmis, 1 L. and G., *t*; Sugd., 122; Cottam *v.* E. C. R., 1 J. and H., 243.

[3] Hovey *v.* Blakeman, 4 Ves., 596; Brice *v.* Stokes, 11 Ves., 319.

[4] Jac., 198.

[5] 1 Beav., 125.

LECTURE VII.

liable for the performance of the trusts, and for any consequences arising from a breach of them. Part of the testator's property was engaged in trade; that trade ought to have been put an end to, and the property invested. Batkin, it appears, went to the place of business from time to time, and it is, therefore, clear that he knew that what ought to have been done was not performed. He acquiesced, week by week, and year by year, in the breach of trust which his co-executor was committing. There is no corrupt motive —no receipt of money which he misapplied to be attributed to him, but he undertook the performance of a duty which he did not perform. This is no small blame: a man cannot be allowed to neglect a duty which he has undertaken. He permitted his co-executor to carry on the trade, and consequently must be considered, in this Court, a party to this breach of duty. It is said, in extenuation, that he did this from the best motives; he thought the brother of the testator was the proper person to carry on the business; he thought there would be more profit made by this mode of dealing with the property, and that it was more advantageous for the children. All this might have been very right to do, and to acquiesce in, if he had undertaken to make good any loss which might occur in the course of the experiment; he could not, however, so act without incurring that responsibility if a loss occurred. I am of opinion, on the authorities and on the established rules of the Court, to which it is not necessary to refer, that a trustee who stands by and sees a breach of trust committed by his co-trustee, becomes responsible for that breach of trust."

Styles v. Guy.

The authorities on the question of the liability of an executor who allows his co-executor to retain the assets of the testator's estate were discussed in the case of *Styles* v. *Guy*[1] by Lord Cottenham. His Lordship, after referring to various cases, said: "In the reported cases, the loss appears to have been of property received by the defaulting executor after the testator's death, and not of a debt due from him before that event; but this cannot furnish any distinction against the co-executor: in the latter case, a debt due from an executor constitutes part of the assets; but over which the co-executor could not have had any control; whereas he had the means of watching, and, if

[1] Mac. and G., 422.

necessary, of interfering with the receipt by the defaulting executor of assets after the death. His being passive cannot be an immunity for him in the case of assets received, and not in the case of a debt retained; but how was this immunity consistent with the admitted liability of all executors for losses from negligence, and inactivity in not calling in debts due to the estate? Could passiveness be a protection in the case of property lost in the hands of a co-executor, but an offence in the case of property lost in the hands of other debtors to the estates? The liability in the latter case arises from the soundest principle. If a person named executor does not choose to accept the office, he has only to renounce, or, at least, to abstain from proving; but if he proves, he thereby accepts the office, and becomes bound to perform the duties of it, and is liable for the consequences of his neglecting to perform them. Of these duties a principal one is to call in and collect such parts of the estate as are not in a proper state of investment. If he knows, or has the means of knowing, that part of the estate is not in a proper state of investment, but is held upon personal security only, and not necessarily so for the purposes of the will, is it not part of the duty he has undertaken, to interfere and to take measures, if necessary, for putting such property in a proper state of investment; or is it no part of his duty because the property is in the hands of a co-executor, and not of any stranger to the estate? It is impossible to find any principle for such a distinction. . . . There cannot be one rule applicable to a portion of the estate given to the executor upon particular trusts, and another rule applicable to another portion of the estate constituting the residue given to the executor for the general purposes of the will. In both cases, the executors are trustees of the funds they are to administer for the purposes specified, and their responsibility with respect to each of such funds must be the same. . . . From what I have already said, it will have been seen that I approve of the principle of the decisions in *Mucklow* v. *Fuller*,[1] *Booth* v. *Booth*,[2] and *Lincoln* v. *Wright*,[3] and that I cannot discover any principle for distinguishing between losses by not calling in debts due from debtors to the estate or balances due from executors. These cases establish, that it is the duty of all

[1] Jac., 198. [2] 1 Beav., 125. [3] 4 Beav., 427.

LECTURE VII.

executors to watch over, and, if necessary, to correct the conduct of each other, and the moment that is established, all ground of distinction between the two classes of cases ceases. Finding, therefore, a principle adopted and acted upon for many years and in many decisions, of the justice and grounds of which I fully approve, I cannot feel any disposition to shake its authority, because I cannot reconcile it with dicta and doctrines of a much earlier date respecting the security of an executor who is passive. I have discussed this case much more at large than any difficulty would seem to warrant, because I thought it material to draw the attention of those who may hold the office of executors, to the doctrine that they cannot safely rely upon what they may find in the earlier cases, laying it down that a devastavit by one of two executors shall not charge his companion, provided he has not intentionally or otherwise contributed to it. The later authorities to which I have referred must show them that passiveness will, in many cases, furnish no protection; but that negligence and inattention in not interfering with, and taking proper measures to prevent or correct the improper conduct of their co-executor, may subject them to responsibilities from which the language of the earlier cases might lead them to suppose they were exempt. The co-executors appear, in this case, to be free from any moral blame; they derived no benefit, but have suffered much from the breach of trust of their co-executor; but they knew that part of the testator's property remained in his hands, and that it was, therefore, not in a proper state of investment: they knew, therefore, that a breach of trust by him was actually in operation, and, excepting some unprofitable applications for accounts and a settlement, nothing was done by them to secure this property so known by them to be in peril."

Liability under decree for common account.

Under a decree against executors for the common accounts, each is chargeable only with his actual or constructive receipts, and, therefore, in such a suit an executor will escape liability by showing, either that he has been only passive, or that he has only acted so far as it was necessary to enable his co-executor to administer the estate; but it is otherwise where he is sought to be made liable for wilful neglect and default.[1]

[1] Terrell v. Mathews, 1 Mac. and G., 433.

Unnecessarily handing over assets.

The principle by which an executor is made liable if he joins with his co-executor in a receipt, is applicable when he has received any portion of the testator's assets and voluntarily and unnecessarily hands it over to his co-executor.[1] So the executor is liable if he sanctions the property remaining in the hands of his co-executor,[2] or does any act by which the co-executor gets absolute possession of the assets, and which but for that act he could not have obtained possession of, such as handing over securities,[3] drawing or endorsing a bill of exchange.[4]

When it was unnecessary that he should do so, the payment over in order to charge must be unnecessary. Under certain circumstances, it may be necessary that one executor should pay over money to his co-executors, and in such a case no liability will attach; as for instance, if the payment is made to enable the executor who receives the money to discharge debts payable where he resides,[5] or to carry on a trade,[6] or where the executor has no legal right to retain the money.[7]

So, the indorsing a bill of exchange made payable to two agents who, on the death of the principal, became his executors in order to enable one to receive the money, was held not to charge the one who did not receive.[8]

If by agreement between the executors one is appointed to receive and intermeddle with such part of the estate and another with such a part, each of them will be chargeable with the whole, because the receipts of each are pursuant to the agreement made betwixt both.[9]

An executor is not liable for any portion of the fund which has been properly applied.[10]

[1] Townsend *v.* Barber, 1 Dick, 356; Langford *v.* Gascoyne, 11 Ves., 333; Clough *v.* Dixon, 3 M. and C., 497.

[2] Doyle *v.* Blake, 2 Sch. and Lef., 231; Lees *v.* Sanderson, 4 Sim., 28; Styles *v.* Guy, 1 Mac. and G., 422.

[3] Candler *v.* Tillett, 22 Beav., 257

[4] Sadler *v.* Hobbs, 2 Bro. C. C., 114; Hovey *v.* Blakeman, 4 Ves., 608.

[5] Bacon *v.* Bacon, 5 Ves., 331; Joy *v.* Campbell, 2 Sch. and Lef., 341.

[6] Toplis *v.* Hurrell, 19 Beav., 423; Home *v.* Pringle, 8 C. and F., 288.

[7] Davis *v.* Spurling, 1 R. and My., 64.

[8] Hovey *v.* Blakeman, 4 Ves., 608.

[9] Gill *v.* The Attorney-General, Hard, 314; Moses *v.* Levi, 3 Y. and C. Ex., 359.

[10] Lord Shipbrook *v.* Lord Hinchinbrook, 11 Ves., 252; (S. C.) 16 Ves., 477; Underwood *v.* Stevens, 1 Mer., 712; Brice *v.* Stokes, 11 Ves., 328; Hewett *v.* Foster, 6 Beav., 259.

LECTURE VII.

Restraining intended breach of trust.

If a trustee becomes aware that his co-trustee threatens, or intents to commit a breach of trust, it is his duty to take steps to prevent it, and, if necessary, to apply for an injunction under s. 54 of the Specific Relief Act, I of 1877. If a breach of trust has been committed, the trustee should institute proceedings against the co-trustee to compel him to restore the property to its proper condition.[2]

If a trustee conceals a breach of trust,[3] or refrains from taking proceedings,[4] he will be liable for loss.

Several liability of co-trustees.

There is no primary liability in respect of a breach of trust, all parties to it being equally liable for the whole of the loss occasioned by the wrongful act or default, and it is no objection to a suit brought by parties seeking relief against a breach of trust, that one of the defendants against whom no relief is prayed, may have been a party to such breach of trust.[5]

If, however, it appears that one trustee took a more active part in the breach of trust, the loss as between the trustees may be thrown upon the more guilty party, who, or if he be dead, his estate, may be ordered to indemnify the passive trustee.[6]

Limitation of liability.

The joint liability of trustees may be taken away by express contract, as where it is agreed each trustee shall receive, and only be answerable for a certain proportion of the trust-estate, in such a case the trustees will only be liable for the amount in their own custody.[7]

Where several trustees are involved in one common breach of trust, a *cestui que trust*, suffering from that breach and proving that the transaction was neither authorized nor adopted by him, may proceed against either or all of the trustees.[8]

Contribution.

Should there be no distinction between the guilt of the trustees, and one of them has been compelled to bear the

[1] See also *In re* Chertsey Market, 6 Price, 279.

[2] Franco *v.* Franco, 3 Ves., 75; Earl Powlet *v.* Herbert, 1 Ves. J., 297.

[3] Boardman *v.* Mosman, 1 Bro. C. C., 68.

[4] Brice *v.* Stokes, 11 Ves., 319; Walker *v.* Symonds, 3 Sw., 41; Booth *v.* Booth, 1 Beav., 125; Williams *v.* Nixon, 2 Beav., 472.

[5] Wilson *v.* Moore, 1 M and K., 127; affd. on appeal, *ib*, 337.

[6] Lockhart *v.* Reily, 1 DeG. and J., 476; Priestman *v.* Tindall, 24 Beav., 244; Butler *v.* Butler, L. R., 5 Ch. Div., 554.

[7] Birls *v.* Betty, 6 Madd. 90.

[8] Walker *v.* Symonds, 3 Swanst., 75; Attorney-General *v.* Wilson, 1 C. and Ph., 28; Fletcher *v.* Green, 33 Beav., 426; *Ex parte* Norris, L. R., 4 Ch., 280.

whole, or a greater portion of the loss, he may institute a suit for contribution against his co-trustees.[1] If any of the *cestuis que trustent* have participated in the breach of trust, they must be made parties.[2] A separate suit must be instituted; contribution cannot be enforced in a suit against the trustee to make good the breach of trust.[3] Where a decree had been passed against several defendants with costs, which had been paid by one of the defendants, the Court, on consent, decreed contribution in respect of the costs.[4] If, however, the trustees have acted fraudulently, the Court will not interfere to enforce contribution, upon the principle that there can be no contribution between wrong-doers upon entire damages for a tort.[5]

Impounding fund in Court.

If there is any fund in Court in the suit, which is payable to the trustee against whom contribution is sought, the Court will impound the fund in order to make good what is due from him. Thus, if a fund in Court is set apart to pay a legacy bequeathed to one of two defaulting trustees who has paid no part of the balance due from him, the other trustee who has paid the whole is entitled to ask the Court to impound the fund, in order to make good the share of the debt which the person who was both trustee and legatee ought to have paid.[6]

Costs.

Where several defendants are involved in a breach of trust, the Court, in decreeing relief in respect of it, decrees the costs of the suit against them all, on the principle of giving the plaintiff the greater security for the payment, and without regard to the relative degrees of culpability in the defendants.[7]

Trustee paying under power-of-attorney.

A *cestui que trust* is often abroad, and then the trustee cannot be sure, that at the time of payment under a power-of-attorney the *cestui que trust* is alive; and if he were dead, the power-of-attorney would be at an end. If, however, the *cestui que trust* give to the trustee a written

[1] Birks *v.* Micklethwait, 33 Beav., 409; Wilson *v.* Goodman, 4 Hare. 63; Jesse *v.* Bennett, 6 D. M. G., 609; Fletcher *v.* Green, 33 Beav., 513; Attorney-General *v.* Dallgars, *ib.*, 624.

[2] Jesse *v.* Bennett, 6 D. M. G., 609.

[3] Fletcher *v.* Green, 33 Beav., 513.

[4] Pitt *v.* Bonner, 1 Y. and C. C. C., 670.

[5] Lingard *v.* Bromley, 1 V. and B., 114; Tarleton *v.* Hornby, 1 Y. and C. Ex., 336; Attorney-General *v* Wilson, 7 Cr and Ph., 28; Suput Singh *v.* Imrit Tewari, I. L. R., 5 Calc., 720.

[6] Birks *v.* Micklethwait, 33 Beav., 409.

[7] Lawrence *v.* Bowle, 2 Phill., 140.

LECTURE VII.

direction by deed, or otherwise, to pay money to a particular person, any payment made under such written direction, until it be revoked, and the revocation comes to the knowledge of the trustee, would be binding on the *cestui que trust's* executor.[1] A convenient course, in cases of this kind, is to transmit the money to a bank abroad, making it payable to the order of the *cestui que trust*; but where the *cestui que trust* is unable to receive his money in person, his direction should be obtained before any particular mode of remittance is adopted.[2] In cases to which English law is applicable, no trustee, executor, or administrator making any payment, or doing any act *bonâ fide*, under or in pursuance of any power-of-attorney, shall be liable for the money so paid, or the act so done, by reason that the person who gave the power-of-attorney was dead at the time of such payment or act, or had done some act to avoid the power; provided that the fact of the death, or of the doing of such act as last aforesaid, at the time of such payment or act *bonâ fide* done as aforesaid by such trustee, executor, or administrator, was not known to him: provided always that nothing herein contained shall in any manner affect or prejudice the right of any person entitled to the money against the person to whom such payment shall have been made; but that such person so entitled shall have the same remedy against such person to whom such payment shall be made, as he would have had against the trustee, executor, or administrator, if the money had not been paid away under such power-of-attorney.[3]

Payment without notice of transfer.

When any beneficiary's interest in the trust-property becomes vested in another person, and the trustee, not having notice of the vesting, pays or delivers trust-property to the person who would have been entitled thereto in the absence of such vesting, the trustee is not liable for the property so paid or delivered.[4] For instance, if a *cestui que trust* mortgages his reversionary interest in a trust-fund, the trustee should be informed of the charge by the mortgagee, and if he is not informed, and the trustee remains without notice of the charge and pays

[1] Lewin, 7th Edn., 323, citing Vance *v.* Vance, 1 Beav., 605; Harrison *v.* Asher, 2 DeG. and Sm., 436; Kiddill *v.* Farnell, 3 Sm. & Giff., 428.

[2] Lewin, 7th Edn., 323.

[3] Act XXVIII of 1866, s. 39.

[4] Trust's Bill, s. 29, referring to Underhill, 156.

over the sum charged to the *cestui que trust*, the trustee will not be liable to the mortgagee.[1] LECTURE VII.

Indemnity-clause.

An instrument of trust drawn according to the English form, whether a will or a deed, usually contains a clause declaring that one trustee shall not be answerable for the receipts, acts, or defaults of his co-trustee. But the proviso, while it informs the trustee of the general doctrines of the Court, adds nothing to his security against the liabilities of his office.[2] A Court of Equity infuses such a clause into every instrument creating a trust; it comes, therefore, to little more than what a Court of Equity will do without any direction;[3] and a person can have no better right upon the expression of what would, if not expressed, be implied.[4]

Such a clause only protects a trustee from liability for losses when his acts have been justifiable; as for instance, if he invests in a security authorized by the instrument of trust, and the security fails, he will not be liable.[5]

In *Bone* v. *Cook*[6] a testator bequeathed certain property to *B* and *C*, and directed them to sell it and invest the proceeds for the benefit of *D*. *B* and *C* sold the property, and the purchase-money was received by *B* and retained in his hands. After the expiration of two years, *C* called upon *B* to make the investment. He was unable to do so, became insolvent, and the money was lost. *C* was held liable, although there was a provision in the instrument creating the trust that the trustees should not be answerable for any trust-moneys further than each person for what he should actually receive.

In order to exempt a trustee from liability for a breach of trust in respect of any of the acts to which I have referred, by force of an express declaration in the instrument of trust, the declaration must be of the very strongest kind; and no declaration, however strong, can exempt a trustee from liability if he has been guilty of gross misconduct. In *Wilkins* v. *Hogg*,[7] a suit against two of three trustees, to make good trust-moneys, &c., they had allowed their co-trustee to receive, was dismissed with costs, the instrument creating the trust having, besides the usual indemnity-clause, provided "that any trustee who should

[1] See Jones v. Gibbons, 9 Ves., 410; Fortescue v. Barnett, 3 M. and K., 36.
[2] Lewin, 7th Edn., 252.
[3] Dawson v. Clarke, 18 Ves., 254.
[4] Worrall v. Harford, 8 Ves., 8.
[5] Rehden v. Wesley, 29 Beav., 213.
[6] M'Clel., 168.
[7] 3 Giff., 116.

LECTURE VII.

pay to his co-trustee, or enable him to receive moneys for the general purposes of the will, shall not be obliged to see to the due application thereof, or be responsible by express or implied notice of the misapplication."

Section 37 of Act XXVIII of 1866 provides, in cases to which English law is applicable, that every deed, will, or other instrument creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words and to the effect following,—that is to say, "that the trustees or trustee for the time being of the said deed, will, or other instrument, shall be respectively chargeable only for such money, stocks, funds, and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust-moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee, for the time being, of the said deed, will, or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will, or other instrument."

LECTURE VIII.

RIGHTS AND POWERS OF TRUSTEES.

Custody of title-deeds — Right of trustee to reimbursement — Costs — Expenses of management — Accounts — Advances by trustee — Wrongful act of agent — Repairs — Lien for expenses — Agents have no lien — Interest on advances — Advances in respect of different trusts — Personal liability of *cestui que trust* to reimburse — Indemnity — Suit to recover advances — Public funds — Indemnity from gainer by breach of trust — Suit to administer trusts — Appeal — Costs — Application to Court for opinion in management of trust-property — Right to settlement of accounts — General authority of trustee — Advice of *cestui que trust* — What acts trustee may do — Repairs — Winding up estate — Maintenance — Compounding or releasing debts — How trust-property may be sold — Conditions of sale — Buying in — Power to convey — Power to vary investment — Power to apply property for maintenance — Minors' Act — Liability of purchaser to see to application of purchase-money — Fines and Recoveries Act — Trustees' and Mortgagees' Powers Act — To whom purchase-money payable — Charge of debts — Notice of breach of trust — Suspension of trustee's powers after decree.

Custody of title-deeds.

THE trustees are entitled to have the custody of the instrument creating the trust, and of all muniments of title relating to the trust-estate, and it will be a breach of their duty if, where there is a trust to perform, they willingly suffer the title-deeds or muniments relating to the trust-property to get out of their possession,[1] it being, as we have seen,[2] their duty to maintain and defend all suits necessary for the protection and preservation of the trust-property, as for instance, to sue tenants for rent, and for this purpose they must have the documents relating to the trust.[3] Moreover, if a *cestui que trust* for life were allowed to have the custody of the title-deeds, he might mortgage or convey the trust-property for valuable consideration without notice, and the interests of remaindermen would be injured. In such a case the trustees might, if it appeared that they acted fraudulently or with gross negligence, be made personally responsible not only to the other

[1] Meux *v.* Bell, 1 Hare, 95. [2] *Ante*, p. 137.

[3] Goode *v.* Burton, 11 Jur., 851; Garner *v.* Hannyngton, 22 Beav., 627; Stanford *v.* Roberts, L. R., 6 Ch., 310.

LECTURE VIII.

cestuis que trustent, but to third parties.[1] It being the right of the trustees to have possession of the title-deeds, they may sue to have them delivered up.[2] Trustees are bound to produce all cases and opinions of counsel, not intended for their own defence, to the *cestui que trust*.[3]

Right of trustee to reimbursement.

A trustee, as we shall see hereafter, has no right, in the absence of express stipulation, to charge anything for the trouble he incurs in the management of the trust. But he is entitled to be reimbursed for expenses out of pocket,[4] such as the expenses caused by the employment of a bailiff,[5] an agent to collect rents, especially when the estate is at a distance,[6] and of a legal adviser.[7] So he may be reimbursed for fees to counsel[8] and travelling expenses[9] if properly incurred.[10] And it is not necessary that the instrument creating the trust should contain an express provision allowing the trustees to charge.[11]

"The first principle of law," said Lord Cottenham,[12] "is of course to reimburse the trustees all expenses properly incurred by them in discharge of the duties of the trust." "It is," said Lord Eldon, "in the nature of the office of a trustee, whether expressed in the instrument of trust or not, that the trust-property shall reimburse him all the charges and expenses incurred in the execution of the trust."[13] The expenditure must have been necessary, or must have been incurred at the request of the *cestui que trust*.[14] Trustees of a void deed, however, cannot charge costs and expenses incurred by them as against the persons who get the deed set aside,[15] though they will be allowed

[1] Evans *v* Bicknell, 6 Ves., 174.
[2] Smith *v*. Willis. Tay., 159: see also Lewin, 7th Edn., 581.
[3] Wynne *v*. Humberston, 27 Beav., 421.
[4] *In re* Ormsby. 1 B. & B., 191.
[5] Bonithron *v*. Hockmore, 1 Vern., 316; Chambers *v*. Goldwin, 9 Ves., 273.
[6] Godfrey *v*. Watson, 3 Atk., 518; Davis *v*. Dendy, 3 Madd., 170; Stewart *v*. Hoare, 2 Bro C. C., 633; Wilkinson *v*. Wilkinson, 2 S. & S., 237; *Ite* Westbrooke, 2 Phillips, 631.
[7] Macnamara *v*. Jones, Dick. 587; Blackford *v*. Davis, L. R., 4 Ch., 304.
[8] Cary, 14; Poole *v*. Pass. 1 Beav., 600.
[9] *Ex parte* Lovegrove, 3 D. & C., 763; *Ex parte* Elsee, 1 Mont., 1; *Ex parte* Bray. 1 Rose. 144.
[10] Malcolm *v*. O'Callaghan, 3 M. & Cr., 62; Bridge *v*. Brown, 2 Y. & C., C. C, 181.
[11] Attorney-General *v*. The Mayor of Norwich, 2 M. & Cr., 424.
[12] Feoffees of Heriot's Hospital *v*. Ross, 12 C & F., 512.
[13] Worrall *v*. Harford, 8 Ves, 8; see Morrison *v*. Morrison, 7 D. M G., 214.
[14] Collinson *v*. Lister, 20 Beav., 368; Leedham *v*. Chawner, 4 K. & J., 458.
[15] Smith *v* Dresser, L R., 1 Eq., 651.

for improvements.[1] If the trustees have been guilty of fraud, they will not be allowed their expenses, even if there is a direction in the instrument of trust directing allowances for expenses.[2] Where trustees were wrongfully appointed, but acted *bonâ fide*, and believed themselves to have been duly appointed, they were allowed their costs, charges, and expenses notwithstanding the defect of title.[3] A trustee who has obtained his costs as between party and party in a suit respecting the trust-fund, will be entitled to charges and expenses reasonably and properly incurred which would not be allowed on taxation.[4] The fact that a trustee has been unsuccessful in litigation either as plaintiff or defendant, will not, in the absence of misconduct, disentitle him to be reimbursed his costs.[5] And a trustee or executor, who is ordered to pay costs to the plaintiff, is entitled, unless he has forfeited his right by some misconduct, to recover from the estate which he has defended, not only the costs which he has incurred to the adversary, but also the costs which he has paid to his own legal adviser.[6] He will not be allowed interest on costs paid by him.[7] If a suit respecting the trust-fund has been caused by the negligence of the trustees, and *à fortiori* through their misconduct, or has been instituted in the face of proper advice,[8] they will not be entitled to costs.[9]

Costs.

A trustee or executor is not entitled to be allowed without question the amount of bills of costs which he has paid *bonâ fide* to the legal adviser to the trust, but such bills may be modified by the Court.[10]

Where two executors, defendants in a suit, gave a joint retainer to a firm of solicitors, and in the course of proceedings it was certified that one executor, who had since died insolvent, was indebted to the testator's estate,—it was held, that the surviving executor was entitled to be paid out of the estate all the costs for which he was liable, and that the costs incurred

[1] Lewin, 7th Edn., 549, citing Woods *v.* Axton, W. N., 1866, p. 207.
[2] Hide *v.* Haywood, 2 Atk., 126; Caffrey *v.* Darby, 6 Ves., 497.
[3] Lewin, 7th Edn, 544, citing Travis *v.* Illingworth, W. N., 1868, p. 206.
[4] Fearns *v.* Young, 10 Ves., 184; Amand *v.* Bradbourne, 2 Ch. Cas., 138.
[5] Lewin, 7th Edn., 546, citing Courtney *v.* Rumley, 6 I. R., Eq., 99.
[6] Lovat *v.* Fraser, L. R., 1 Sc. App., 37.
[7] Gordon *v.* Traill, 8 Price, 416.
[8] Peers *v.* Ceeley, 15 Beav., 209.
[9] Caffrey *v.* Darby, 6 Ves., 497: see Leedham *v.* Chawner, 4 K. & J., 458.
[10] Johnson *v.* Telford, 3 Russ., 477; Allen *v.* Jarvis, L. R., 4 Ch., 616. As to taxation, see Lewin, 7th Edn, 546.

LECTURE VIII.

for the deceased executor in taking the account of his debt must be set off against the sum found due from him.[1]

Where, in a suit to set aside a compromise made on behalf of infants by trustees, personal fraud was charged against one of the trustees, and the suit was dismissed with costs to be paid by the next friend, who could not pay, the trustee was held to be entitled to be paid his costs out of the estate, as he had defended the suit for the benefit of the estate, though at the same time he had defended his own character.[2]

Expenses of management.

A trustee will be allowed to reimburse himself for necessary expenses incurred in the management of the trust-estate, even though the instrument of trust provides a remuneration for trouble. Thus, where a testator, who gave annuities to his trustees as a recompense for their care and trouble in the execution of the will, died possessed of a number of houses let at weekly rents, the trustees were held to be entitled to employ an agent to collect the rents and to pay him out of the trust-funds.[3] The trustee should keep a regular account of the expenses incurred. If he does not, the Courts will order a reasonable allowance, taking care that the remissness and negligence of the trustee in not having kept accounts shall not be encouraged.[4]

Accounts.

Advances by trustee.

As it is a rule that the *cestui que trust* ought to save the trustee harmless as to all damages relating to the trust, so within the reason of that rule, where the trustee has honestly and fairly, without any possibility of being a gainer, laid down money, by which the *cestui que trust* is discharged from being liable for a loss, or from a plain and great hazard of being so, the trustee ought to be repaid.[5] If he has a right to protect the property from immediate and direct injury, he must have the same right where the injury threatened is indirect but probable.[6] Thus, in several cases it has been held, that conservators of public works and Municipal Commissioners are entitled to use the trust-funds at their disposal in opposing proposed Acts of Parliament which would injure the trust-property.[7]

[1] Watson *v.* Row, L. R., 18 Eq., 680.
[2] Walters *v.* Woodbridge, L. R., 7 Ch. Div., 504.
[3] Wilkinson *v.* Wilkinson, 2 S. & S., 237: see Webb *v.* The Earl of Shaftesbury, 7 Ves., 480.
[4] Balsh *v.* Hyam, 2 P. Wms, 453.
[5] Lewin, 7th Edn., 547.
[6] Bright *v.* North, 2 Phill., 220.
[7] Reg. *v.* Norfolk Commissioners of Sewers, 15 Q. B., 549; Attorney-General *v.* Andrews, 2 Mac. & G., 225; Attorney-General *v.* Eastlake, 11 Hare, 205.

LECTURE VIII.

Wrongful act of agent.

Again, if a trustee employs a proper agent to do an act, the directing which to be done was within the due discharge of his duty, and the agent makes a mistake, the consequences of which subject the trustee to legal liability to a third party, he is entitled to be indemnified out of the trust-estate.[1]

Repairs.

And trustees have been allowed expenses for acts which were reasonable, though perhaps not strictly according to law.[2] But a trustee, though he will be allowed to reimburse himself for moneys expended in the repair and preservation of the trust-property, will not be allowed to charge for sums laid out in increasing the value of it.[3]

Lien for expenses.

A trustee is entitled to a lien upon the trust-estate for his out-of-pocket expenses, so long as it remains trust-estate,[4] but not for the expenses of any act not warranted by the trust.[5] He may retain the trust-deeds,[6] and the *cestui que trust* cannot compel a conveyance until the lien is discharged, and this lien has priority over costs of a suit,[7] or to any charge created by the *cestui que trust*.[8]

If a *cestui que trust* advances money for the purpose of paying a sum properly payable out of the *corpus* of the trust-funds, he will be entitled to a lien on the corpus for the amount advanced.[9]

Agents have no lien.

But agents and other persons employed by the trustees, such as solicitors, surveyors, &c., have no lien,[10] and except in the case of fraud are accountable only to the trustees.[11] If the instrument creating the trust expressly directs that a particular individual is to be employed at a salary, there will be a trust in his favour, and he will have a claim for his remuneration, but that can hardly be called a lien.[12] It must appear that it was the intention of the author of the trust that the person named should be employed; a

[1] Benett *v.* Wyndham, 4 DeG. F. & J., 259.
[2] Attorney-General *v.* Pearson, 2 Coll., 581.
[3] Sandon *v.* Hooper, 6 Beav., 248.
[4] Worrall *v.* Harford, 8 Ves., 8; *Ex parte* Chippendale, 4 D. M. G., 19.
[5] Leedham *v.* Chawner, 4 K. & J., 458.
[6] Darke *v.* Williamson, 25 Beav., 622.
[7] Morison *v.* Morison, 7 D. M. G., 226.
[8] *Re* Exhall Coal Co., 35 Beav., 449.
[9] Todd *v.* Moorhouse, L. R., 19 Eq., 69.
[10] Worrall *v.* Harford, 8 Ves., 8; Hall *v.* Laver, 1 Hare, 571; Francis *v.* Francis, 5 D. M. G., 108.
[11] Myler *v.* Fitzpatrick, 6 Madd., 360; Attorney-General *v.* Earl of Chesterfield, 18 Beav., 596; Lee *v.* Sankey, L. R., 15 Eq., 204.
[12] See Williams *v.* Corbett, 8 Sim., 349; Hibbert *v.* Hibbert, 3 Mer., 681; Consett *v.* Bell, 1 Y. & C. C. C., 569.

LECTURE VIII.

mere request or recommendation is not sufficient.[1] The solicitor of trustees may set off payments which have properly been made by him in the performance of the trust against his receipts in the same matter.[2]

Interest on advances.

A trustee who pays money out of his own pocket in respect of debts is in no worse position than a stranger who makes advances, and is entitled to interest on his debt.[3]

Advances in respect of different trusts.

"If a person be trustee of different estates for the same *cestui que trust* under the same instrument, and he incurs expenses on account of one estate in respect of which he has no funds, it is presumed that he may apply to their discharge any money which has come to his hands from any other of the estates; but he would not be justified in mixing up claims under one instrument of trust with those under another."[4]

Personal liability of *cestui que trust* to reimburse.

If the trust-fund fails, and the trustees, acting in good faith and within their powers, have expended money for the benefit of the trust-estate, they may call upon the *cestuis que trustent* personally to reimburse them. "I think," said Turner, L. J.,[5] "that where parties place others in the position of trustees for them, they are in equity personally bound to indemnify them against the consequences resulting from that position." The money must have been properly expended.[6]

Indemnity.

A trustee who has incurred a liability in respect of the trust-estate, may call upon the *cestuis que trustent* to indemnify him against the liability,[7] even before any actual loss has been incurred.[8]

Suit to recover advances.

A trustee who has expended monies on the trust-estate at the request of a *cestui que trust*, may institute proceedings against him, or if he be dead, against his representatives, to recover the amount expended, provided that the expenditure was justifiable.[9]

[1] Shaw *v.* Lawless, 5 C. & F., 129; Finden *v.* Stephens, 2 Phill., 142; Knott *v.* Cottee. *ib.*, 192. [2] *Re* Sadd, 34 Beav., 652.

[3] *In re* Beulah Park Estate, L. R, 15 Eq., 43; Finch *v.* Pescott, L. R., 17 Eq., 554.

[4] Lewin, 7th Edn., 551, citing Price *v.* Loaden, 21 Beav., 508.

[5] *Ex parte* Chippendale, 4 D. M. G., 54.

[6] Leedham *v.* Chawner, 4 K. & G., 458; Collinson *v.* Lister, 20 Beav., 368.

[7] James *v.* May, L. R., 6 H. L., 333; Hemming *v.* Maddick, L. R., 9 Eq., 175.

[8] Phené *v.* Gillan, 5 Hare, 1. As to the fund out of which expenses are payable, see Lewin, 7th Edn., 551.

[9] Balsh *v.* Hyam, 2 P. Wms., 453; *Ex parte* Watts, 3 DeG. J & S., 394; Jervis *v.* Wolferstan, L. R, 18 Eq, 18.

LECTURE VIII.

Public funds.

Funds applied by the Government for the public service are not trust-funds in the hands of the persons empowered to disburse them, and the Court has no jurisdiction to take any account of the application of such funds.[1]

Indemnity from gainer by breach of trust.

A person other than a trustee, who has reaped the benefit of a breach of trust, must indemnify the trustee to the extent of the amount actually received by such person under the breach; and where he is a beneficiary, the trustee has a charge on his interest in the trust-property for such amount.[2] "Now," said Lord Langdale,[3] "nothing can be more clear than the rule which is adopted by the Court in these cases, that if one party having a partial interest in the trust-fund induces the trustee to depart from the direction of the trust for his own benefit, and enjoys that benefit, he shall not be permitted personally to enjoy the benefit of the trust, while the trustees are subjected to a serious liability which he has brought upon them. What the Court does in such a case, is to lay hold of the partial interest to which that person is entitled, and apply it, so far as it will extend, in exoneration of the trustees, who, by his request and desire or acquiescence, or by any other mode of concurrence, have been induced to do the improper act."[4] But in such a case the Court will not order the *cestui que trust* personally to recoup the trustee.[5]

Suit to administer trusts.

If there is any reasonable question or doubt as to the persons entitled under the instrument creating the trust, the trustees may institute a suit to have the trusts administered under the direction of the Court, for they cannot be expected to run any risk.[6]

Appeal.

The decree of the Court of first instance is an indemnity to the trustee, and he cannot be made liable for acting under it. If, therefore, he appeals from the decision, it will be at his own risk.[7] And he will be liable for costs, unless there

Costs.

[1] Grenville Murray *v.* The Earl of Clarendon, L. R., 9 Eq., 11.

[2] Draft Trust Bill, s. 33, citing Underhill. p. 163; and see Hobday *v.* Peters, 28 Beav., 354; Vaughan *v.* Vanderstegen, 2 Drew., 165, 363; Binks *v.* Micklethwait, 33 Beav., 409; Cooper *v.* Cooper, L. R., 7 H. L., 53.

[3] Lincoln *v.* Wright, 4 Beav., 432.

[4] See the authorities, Lewin. 7th Edn., 477.

[5] Raby *v.* Ridehalgh, 7 D. M. G., 108; Walsham *v.* Stainton, 1 H. and M., 337; Butler *v* Butler, L. R., 5 Ch. D., 554; 7 Ch. Div., 116.

[6] Taylor *v.* Glanville, 3 Madd., 176; Goodson *v.* Ellison, 3 Russ., 583; Campbell *v.* Home, 1 Y. and C. C. C., 664; Gardiner *v.* Dowues, 22 Beav., 397; Merlin *v.* Blagrave, 25 Beav., 139.

[7] Rowland *v.* Morgan, 13 Jur., 23; Tucker *v.* Horneman, 4 D. M. G., 395.

LECTURE VIII.

were very good grounds for the appeal, even though he acts without fraud or malice.[1]

Application to Court for opinion in management of trust-property.

The Trustees' and Mortgagees' Powers Act[2] provides, in cases to which English law is applicable, that "any trustee, executor, or administrator, shall be at liberty, without the institution of a suit, to apply, by petition to any Judge of the High Court for the opinion, advice, or direction of such Judge on any question respecting the management or administration of the trust-property, or the assets of any testator or intestate. Such application shall be served upon, or the hearing thereof shall be attended by, all persons interested in such application, or such of them as the said Judge shall think expedient. The trustee, executor, or administrator acting upon the opinion, advice, or direction given by the said Judge, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator in the subject-matter of such application. Provided, nevertheless, that this Act shall not extend to indemnify any trustee, executor, or administrator in respect of any act done in accordance with such opinion, advice, or direction as aforesaid, if such trustee, executor, or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction: and the costs of such application as aforesaid shall be in the discretion of the Judge to whom the said application shall be made." These provisions are substantially the same as those of Lord St. Leonards's Act.[3] Under that Statute the Court of Chancery in England has advised trustees as to the appropriation of a fund for a legacy; as to advancement, maintenance, and advancement out of capital, change of investments, sale of houses, compromises; and as to taking proceedings.[4] Petitions for the advice of the Court should relate only to the management and investment of trust-property; the Court will not construe an instrument, or make any order affecting the rights of parties.[5] In *In re Mackintosh's Settlement*,[6] the Court sanctioned the compromise by trustees of a claim depending on foreign law and the

[1] *Re* Knight's Trust, 27 Beav., 45; Lowson *v.* Copeland, 2 Bro. C. C., 156.
[2] XXVIII of 1866, s. 43.
[3] 22 and 23 Vict., c. 35, s. 30.
[4] Seton on Decrees, 4th Edn., 493.
[5] *Re* Lorenz's Settlement, 1 Dr. and Sm., 401; and see *Re* Evans, 30 Beav., 232.
[6] 42 L. J., Ch., 208.

accounts of disbursements on an estate in a foreign country, which accounts the trustees had no means of verifying.

No appeal lies in England from an order made by a Judge of first instance on such a petition, but an opinion has been given by the Lords Justices of Appeal at the request of one of the Vice-Chancellors.[1]

An order made under this section will only indemnify the trustees upon the facts stated in the petition.[2] No affidavits can be used.[3] It is not necessary that all the trustees should join in the petition, the words are "any trustee may apply."[4]

Right to settlement of accounts.

After the trust has been completed, the trustee is entitled to have his accounts examined and to have a settlement of them. He is bound to give accounts if demanded, but giving the accounts he is entitled, to use a familiar phrase, to have them wound up. If the party to receive is satisfied upon the account sent in, that nothing more is coming to him, he ought to close the account and give an acknowledgment which will be equivalent to a release; on the other hand, if the *cestui que trust* is dissatisfied with the accounts, he ought to require to have the accounts taken; he is not at liberty to do neither, and keep an action for an account hanging for an indefinite time over the head of the trustee.[5]

General authority of trustee.

A trustee may do all acts which are reasonable and proper for the realization, protection, or benefit of the trust-property, and for the safety and support of a *cestui que trust* who is not competent to contract, unless his powers in the case of a special trust are limited, when he may not go outside them. "Under particular circumstances," says Mr. Lewin,[6] "the trustee is held capable of exercising the discretionary powers of the *bonâ fide* proprietor; for the trust-estate itself might otherwise be injuriously affected. The necessity of the moment may demand immediate decision, while the sanction of the parties who are beneficially interested could not be procured without great inconvenience (as where the *cestuis que trustent* are a numerous class), or perhaps could not be obtained at all (as where

[1] See Seton, 4th Ed., 493.
[2] *Re* Mockett's Will, Johns., 628.
[3] *Re* Muggeridge's Trusts, Johns., 625.
[4] *Re* Muggeridge's Trusts, Johns., 625. See further, Lewin, 7th Edn., 534—536.
[5] 2 Spence, 46.
[6] 7th Edn., 501.

LECTURE VIII.

the *cestuis que trustent* are under disability, or not yet in existence), the alternative of consulting the Court would always be attended with considerable expense, and, it may be, an expense wholly disproportioned to the importance of the occasion, and perhaps in the meantime the opportunity might be lost. It is, therefore, evidently in furtherance of the *cestui que trust's* own interest, that, where the circumstances of the case require it, the trustee should be at liberty to exercise a reasonable discretionary power.[1] But a trustee for adults should not take any proceeding without consulting his *cestuis que trustent;* and if he do, and the proceeding is disavowed by them, he may have to pay the costs himself.[2]

Advice of *cestui que trust.*

If there is a discretion to be exercised under the trust, the trustee may apply to the *cestui que trust* for his advice and assistance in the exercise of it, and if the *cestui que trust* refuses his aid, he will not be entitled afterwards to complain of what the trustee has done in the exercise of his own discretion. So again, where it is doubtful what ought to be done under a trust, the trustee may give notice to the *cestui que trust* of his intention to do a particular act, unless the *cestui que trust* interferes; and if the *cestui que trust* does not interfere, the Court will hold that the trustee is not liable for doing that act. There are cases in which the trust is not definite or precise. If the trust is definite and clear, the trustee is bound to follow it, and will not be excused for a breach of trust, merely because he has given notice to the *cestui que trust* of the act which he intends to commit.[3]

What acts trustee may do.

Trustees are entitled to do any act which they would be compelled to do by the Court at the suit of the *cestuis que trustent,* or which the Court itself would direct to be done.[4] For instance, trustees may cut down decaying timber,[5] or appropriate a legacy when the appropriation would have been directed by the Court.[6] So if they are authorized to

[1] See Angell *v.* Dawson, 3 Y. and C., 317; Darke *v.* Williamson, 25 Beav., 622; Harrison *v.* Randall, 9 Hare, 407; Forshaw *v.* Higginson, 8 D. M. G., 827; Ward *v.* Ward, L. R., 2 H. L., 784.

[2] Lewin, 7th Edn., 502, citing Bradby *v.* Whitchurch, W. N., 1868, p. 81.

[3] Life Association of Scotland *v.* Siddal, 3 DeG. F. and J., 73, *per* Turner, L. J.

[4] Shaw *v.* Borrer, 1 Keen, 576.

[5] Waldo *v.* Waldo, 7 Sim., 261; Gent *v.* Harrison, Johns., 517; Earl Cowley *v.* Wellesley, L. R., 1 Eq., 656.

[6] Hutcheson *v.* Hammond, 3 Bro. C. C., 128.

sell land, they may do such acts as in the *bonâ fide* exercise of their discretion are necessary to carry out the sale.[1] And if a trustee acting in the *bonâ fide* exercise of his discretion, makes a payment which, though not authorized by the trust, is in his opinion necessary to enable him to execute the trust, he will be allowed such payment in passing his accounts, though he does not act prudently in assuming the responsibility of making such a payment without the sanction of the Court.[2] Again, trustees may avoid unnecessary formalities.[3]

Repairs.

Where the *cestui que trust* is incapable of contracting, the trustee may expend money in necessary repairs in improving the estate.[4] But he may not expend money in unnecessary expenses, such as ornamental improvements.[5] So a trustee might be justified in insuring,[6] but where there is a tenant-for-life, he could not be advised to do so out of the income without the tenant-for-life's consent. But if an annuity and a policy on the life of the *cestui que vie* be made the subject of a settlement, it is implied that the trustee is to pay the premiums out of the income.[7]

Winding up estate.

An executor will be allowed a reasonable time for breaking up his testator's domestic establishment, and discharging his servants, and a period of two months is not an unreasonable delay.[8] An executor is not bound to pay or deliver any legacy until the expiration of one year from the testator's death;[9] but if the assets are sufficient, he may pay before the expiration of the year.[10]

Maintenance.

A trustee will be allowed credit in his accounts for sums properly expended for the protection and safety or maintenance and support of his *cestui que trust* at a time when he, though adult, was incapable of taking care of himself.[11] As to when maintenance should be made out of interest,

[1] Forshaw *v.* Higginson, 3 Jur., N. S., 478.
[2] *Ibid.* See also Seagram *v.* Knight, L. R., 2 Ch., 630.
[3] Pell *v.* Dewinton, 2 DeG. and J., 20; George *v.* George, 35 Beav., 382.
[4] Bowes *v.* Earl of Strathmore, 8 Jur., 92.
[5] Attorney-General *v.* Geary, 3 Mer., 513; Bridge *v.* Brown, 2 Y. and C. C. C., 181: see further, Lewin, 7th Edn., 504.
[6] Fry *v.* Fry, 27 Beav., 146.
[7] Lewin, 7th Edn., 506, citing D'Arcy *v.* Croft, 9 Ir. Ch., 19.
[8] Field *v.* Peckett, 29 Beav., 576.
[9] Act V of 1881, s. 117.
[10] Angerstein *v.* Martin, 1 T. and R., 241; Pearson *v.* Pearson, 1 Sch. and Lef., 12; Garthshore *v.* Chalie, 10 Ves., 13.
[11] Nelson *v.* Duncombe, 9 Beav., 211; Chester *v.* Rolfe, 4 D. M. G., 798.

LECTURE VIII.

and when out of principal, see Lewin.[1] The general rule is not to break into the capital unless it is very small.[2]

Compounding or releasing debts.

Trustees or executor may, under certain circumstances, compound or release debts where it is clearly for the benefit of the trust-fund that they should do so.[3] If they are unable to show that they have acted for the benefit of the estate, they will be liable for the debt.[4] According to English law, an executor or administrator may pay a debt barred by the Statutes of Limitation,[5] and the same rule obtains in this country,[6] the principle being, that the law of limitation merely bars the remedy but does not extinguish the debt.[7] An executor would not be justified in paying a barred debt after a decree for administration.[8]

"Trustees of an equity of redemption of lands mortgaged for more than their value, may, it is conceived, release the equity of redemption to the mortgagee, rather than be made defendants to a foreclosure-suit, the costs of which, so far as incurred by themselves, would fall upon the trust-estate."[9]

How trust-property may be sold.

Where the instrument of trust authorizes the trustees to sell the trust-property, the trustees may sell either by public auction or private contract, as they may think most beneficial,[10] and it is not necessary that they should, before selling by private contract, have advertised the property for sale by public auction.[11] They should not delegate the general trust for sale. But there are many acts which the trustees must necessarily do through the agency of other persons and which are valid when so done, and the employment of agents to do such acts as an ordinary person acting with common care would employ agents to do, is justifiable.[12]

[1] 7th Edn, 507.

[2] *Ibid*, 508. As to maintenance when the father is alive as to advancement, see Lewin, 7th Edn., 509—511.

[3] Ratcliffe *v.* Winch, 17 Beav., 216; Forshaw *v.* Higginson, 8 D. M. G., 827; *Ex parte* Ogle, L. R., 8 Ch., 715; Act V of 1881, s. 92, ill. (*a*).

[4] Wiles *v.* Gresham, 5 D. M. G, 770.

[5] Coombs *v.* Coombs, L. R., 1 P. and D., 289; Lewis *v.* Rumney, L. R., 4 Eq., 551.

[6] Administrator-General of Madras *v.* Hawkins, I. L. R., 1 Mad., 267.

[7] Mohesh Lal *v.* Busunt Kumaree, I. L. R., 6 Calc., 340, overruling Ram Chunder Ghosaul *v.* Juggut Monmohiney Dabee, I. L. R., 4 Calc., 283.

[8] See Lewin, 7th Edn., 511, 512.

[9] Lewin, 7th Edn., 513: and see further as to the general powers of trustees, 513—518.

[10] Davey *v.* Durrant, 1 DeG. and J., 535. [11] *Ibid.*

[12] *Ex parte* Belchier, Amb., 218; Ord *v.* Noel, 5 Madd., 438; Rossiter *v.* Trafalgar Life Assurance Co., 27 Beav., 377.

Where the trustees sell by public auction, they must take care to have the property properly advertised, and that due notice of the sale is given. If they neglect these precautions, the sale may be stayed by injunction at the suit of the *cestui que trust*, it being the duty of the trustee to sell to the best advantage.[1] The property may be sold in different lots, should that seem to be the course most likely to attract purchasers,[2] unless the instrument of trust provides that the property is to be sold in one lot.

The Trustees' and Mortgagees' Powers Act (XXVIII of 1866) provides, in cases to which English law is applicable (s. 2), that "in all cases where by any will, deed, or other instrument of settlement, it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale, either generally or in any particular event, over any immoveable property named or referred to in, or from time to time subject to the uses or trusts of such will, deed, or other instrument, it shall be lawful for such trustees or other persons, whether such property be vested in them or not, to exercise such power of sale by selling such property either together or in lots, and either by public auction or private contract, and either at one time or at several times."

Conditions of sale.

The trustees should take care that every necessary and no unnecessary condition is attached to the sale.[3] They must not omit any condition which the state of their title requires, but the employment by them of conditions of such a depreciatory character as to involve the purchaser in a breach of trust, will constitute an objection to the title, besides rendering them liable to their *cestuis que trustent*.[4] "I have always understood it to be the law consistently with authority and principle," said James, L. J.,[5] "that however large may be the power of trustees under their trust-deed to introduce conditions limiting the title and other special conditions which have, or are calculated to have, a depreciatory effect on the sale, they are

[1] Webb *v.* Earl of Shaftesbury, 7 Ves., 487; Attorney-General *v.* Corporation of Liverpool, 1 M. and C., 210; Attorney-General *v.* Aspinall, 2 M. and C., 623; Milligan *v.* Mitchell, 1 M. and K., 446; Dance *v.* Goldingham, L. R., 8 Ch., 902.

[2] Ord *v.* Noel, 5 Madd., 438.

[3] *Ex parte* Lewis, 3 Gl. and J., 173.

[4] Ord *v* Noel, 5 Madd., 438; Hobson *v.* Bell, 2 Beav., 17; Borrell *v.* Dann, 2 Hare, 440: see 1 Dav. Convey., 441.

[5] Dance *v.* Goldingham, L. R., 8 Ch., 909.

LECTURE VIII.

bound to exercise them in a reasonable manner—that they must not rashly or improvidently introduce a depreciatory condition for which there is no necessity. No general rule can be laid down, determining what conditions do, and what do not, fall within this description. Each case must depend mainly on its own circumstances, and a Court of Equity will allow trustees a fair discretion in employing special conditions.[1] They may stipulate that all objections to the title shall be taken within twenty-one days from the delivery of the abstract, or be deemed waived, and that time in that respect is to be deemed of the essence of the contract, and that if a valid objection be taken, they shall be at liberty to rescind the contract on returning the deposit, and to re-sell.[2] Such a condition may, in a certain sense, be depreciatory, yet it is one which a prudent owner selling in his own right would introduce[3] The trustees must be careful to avoid misdescriptions, since it seems that they cannot enforce a condition for compensation if they make an error in describing the property.[4] Where a sale is made by trustees or mortgagees, or other persons who do not enter into the usual covenants for title, the fact should be mentioned in the conditions.[5]

The condition should be framed so as to entitle the vendor to rescind, not merely on the purchaser insisting upon some objection as to title, but on his insisting on any objection or requisition as to either title or conveyance; and should provide that the right may be exercised notwithstanding any intermediate negotiation in respect of such objection or requisition.[6] A condition that the trustees shall only be called upon to covenant against incumbrances is not unusual.[7] So, where the trustees have no power to give receipts, they may stipulate that their receipts shall be sufficient, and that the concurrence of the *cestuis que trustent* shall not be required.[8]

Buying in.

Trustees may fix a reserved bidding, and if the amount fixed is not reached at the sale, may buy in the property

[1] Sugd., 51.
[2] Hobson *v.* Bell, 2 Beav., 17; Falkner *v.* The Equitable Society, 4 Drew., 352.
[3] Falkner *v.* Equitable Reversionary Co., 4 Drew., 352.
[4] White *v.* Cuddon, 8 C. and F., 766; Hobson *v.* Bell, 2 Beav., 17: but see Hill *v.* Buckley, 17 Ves., 394.
[5] 1 Dav., 441, 442.
[6] Dart V. and P., 5th Edn., 157.
[7] Dart V. and P., 5th Edn., 172.
[8] Wilkinson *v.* Hartley, 15 Beav., 183.

at that price.[1] They must be careful not to delay in re-selling, otherwise, if there is a loss on the re-sale, they may be held liable.[2]

The Trustees and Mortgagees' Powers Act[3] provides, in cases to which English law is applicable, that "it shall be lawful for the persons making any sale to insert any such special or other stipulations, either as to title or evidence of title or otherwise, in any conditions of sale, or contract of sale, as they shall think fit; and also to buy in the property or any part thereof at any sale by auction, and to rescind or vary any contract for sale, and to re-sell the property which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby; and no purchaser under any such sale shall be bound to enquire whether the persons making the same may or may not have in contemplation any particular re-investment of the purchase-money in the purchase of any other property or otherwise." But this section would not warrant trustees in introducing stipulations which are plainly not rendered necessary by the state of the title, and are calculated to damp the success of the sale.[4]

Power to convey.

When the trust-property has been sold either by public auction or private contract, the trustees must convey it to the purchaser in such manner as may be necessary. The Trustees' and Mortgagees' Powers Act[5] provides, that, "for the purpose of completing any sale, the persons empowered to sell shall have full power to convey or otherwise dispose of the property in question in such manner as may be necessary."

Trustees do not usually enter into covenants for title beyond a covenant against incumbrances,[6] and they cannot be compelled to enter into a covenant for further assurance.[7]

Power to vary investment.

Where the instrument creating the trust does not contain any power to the trustees to alter the mode of investment, the trustees may, nevertheless, sell the property, and invest

[1] *Re* Peyton's Settlement, 8 Jur., N. S., 453; 30 Beav., 252; Else *v.* Barnard, 28 Beav., 228; Bousfield *v.* Hodges, 33 Beav., 90.
[2] Taylor *v.* Tabrum, 6 Sim., 281; Fry *v.* Fry, 27 Beav., 144.
[3] XXVIII of 1866, s. 3.
[4] See Lewin, 7th Edn.
[5] XXVIII of 1866, s. 4.
[6] Worley *v.* Frampton, 5 Hare, 560.
[7] *Ibid.*

LECTURE VIII.

the proceeds on any of the securities which would be authorized by the Court, see *ante*, p 160, and vary such investment from time to time, provided that they never buy any redeemable security at a premium.[1]

The Trustees' and Mortgagees' Powers Act[2] provides, that "trustees having trust-money in their hands, which it is their duty to invest at interest, shall be at liberty, at their discretion, to invest the same in any Government securities; and such trustees shall also be at liberty, at their discretion, to call in any trust-funds invested in any other securities than as aforesaid, and to invest the same on any such securities as aforesaid for others of the same nature. Provided always, that no such original investment as aforesaid shall be made where there is a person under no disability entitled in possession to receive the income of the trust-fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person."

Power to apply property for maintenance.

Where the *cestuis que trustent*, or some of them, are infants, the trustees may apply the trust-fund towards their maintenance,[3] either out of interest or under certain circumstances out of the principal. But the principal should not be touched if it can be helped. The father, if alive, is the proper person to maintain the infants, and the Court will not direct maintenance without inquiring whether the father is able to maintain the infant himself; but no inquiry will be directed in the case of a widow applying for maintenance.[4]

If, however, the father has abandoned his children, or is destitute, the trustees will be allowed sums properly expended,[5] upon the principle that a trustee may do what the Court would direct to be done.[6]

Income which has been accumulated may be resorted to for future maintenance.[7]

The trustees will only be justified in applying the principal towards the maintenance of infant *cestuis que trustent* when it is so small that if invested, the income would be

[1] Waite *v.* Littlewood, 41 L. J., Ch., 636.
[2] XXVIII of 1866, s. 32.
[3] Duncombe *v.* Nelson, 9 Beav., 211; Chester *v.* Rolfe, 4 D. M. G., 798.
[4] Lewin, 7th Edn., 509.
[5] Sisson *v.* Shaw, 9 Ves., 288; Prince *v.* Hine, 26 Beav., 634.
[6] Maberley *v.* Turton, 14 Ves., 499: see *ante*, p. 220.
[7] Edwards *v.* Grove, 2 DeG. F. and J., 210.

wholly insufficient. Thus, where four infants were entitled to a share of £1,538, 3 consols, and their father, a man of improvident habits, living apart from his wife, did not contribute to the support of either wife or children, the trustees were allowed two sums of £200 and £100, applied by them towards the maintenance of the infants.[1]

If the fund is considerable, say Rs. 10,000, the trustees would not be safe in applying the principal without the sanction of the Court.[2]

In certain cases the trustees may expend a portion of the principal of the trust-fund for the advancement of a child, unless there is a limitation over, for then the Court itself could not order the advancement.[3]

The Trustees' and Mortgagees' Powers Act[4] provides, that, "in all cases where any property is held by trustees in trust for a minor, either absolutely or contingently on his attaining majority, or on the occurrence of any event previously to his attaining majority, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such minor, or otherwise to apply for or towards the maintenance or education of such minor, the whole or any part of the income to which such minor may be entitled in respect of such property, whether there be any other fund applicable, for the same purpose, or any other person bound by law to provide for such maintenance or education or not: and such trustees shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof, from time to time, in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen. Provided always, that it shall be lawful for such trustees at any time, if it shall be appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year."

Minors' Act.

Various Acts regarding the property of minors have been passed from time to time. Act XL of 1858 contains provisions for placing the property of minors not being European

[1] Prince *v* Hine, 26 Beav, 634: see also *Ex parte* Hays, 3 DeG. and Sm., 485; Bridge *v.* Brown, 2 Y. and C. C. C., 181.

[2] Barlow *v* Grant, 1 Vern., 255: see further as to maintenance, Tagore Law Lecture, 1877, Trevelyan; Lewin, 7th Edn., 507—511.

[3] See Lewin, 7th Edn., 510.

[4] XXVIII of 1866, s. 33.

LECTURE VIII.

British subjects, and who are not brought under the superintendence of the Court of Wards, under the charge either of a relative of the minor, or of a public curator; and s. 11 gives the Civil Court power to fix such allowance as it may think proper for the maintenance of the minor. Section 25 made it incumbent upon the guardians of minors to provide for their education. That section was repealed by Act IV (B. C.) of 1870, s. 86, which provides, s. 64, that general superintendence and control of every minor ward is thenceforth to be vested in the Court of Wards. This section only applies to minors who are subject to the Court of Wards.

Act XX of 1864, which provides for minors in the Presidency of Bombay, and contains similar provisions to Act XV of 1858 as to placing the property of minors not being European British subjects under the charge of relatives or a public curator, provides (s. 10) that the Civil Court may fix such allowance as it may think fit for the maintenance of the minor; and (s. 25) for his education.

Act XXI of 1855, an Act for making better provision for the education of male minors subject to the superintendence of the Court of Wards in the Presidency of Fort St. George, gives the Collector (ss. 2 and 3) power to make provision for the maintenance and education of minors subject to the Court.

And Act XIII of 1874, the European British Minors' Act, which extends to the Punjab, Oudh, the Central Provinces, British Burma, Coorg, Ajmeer, Mairwara, and Assam, provides that the Court may order that the principal of the ward's property, or any part thereof, shall be applied for his maintenance, education, or advancement.

Liability of purchaser to see to application of purchase-money.

All the trustees must, as we have seen, join in giving receipts for any property transferred to them as trustees. In properly drawn instruments of trusts, whether deeds or settlements, a power is inserted authorizing the trustees to give receipts for trust-moneys or other funds paid or transferred to them. Where there is no such power, it is in general incumbent on the person paying trust-money to see that it is applied as directed by the instrument of trust. The leading case on this point is *Elliot* v. *Merryman*;[1] there it was decided (1) that a purchaser of personal property from an executor will not be liable

[1] Barn, 781; W. and T., L. C., 59.

to see to the application of the purchase-money, except in cases of fraud; (2) that it is a general rule, that, where real estate is devised to trustees upon trust to sell for payment of debts generally, the purchaser is not bound to see to the application of the money, and that the same rule applies where real estate is not devised to be sold for the payment of debts, but is only charged with such payment; and (3) that if real estate is devised upon trust to be sold for the payment of certain debts, mentioning to whom in particular the debts are owing, the purchaser is bound to see that the money is applied for the payment of those debts.

The reason for the rule is this, at law the trustees are the owners, and they can, therefore, give a valid discharge. But in equity the *cestuis que trustent* are the owners, and Courts of Equity, therefore, hold, that a purchaser must get a discharge from them unless the instrument of trust authorizes the trustees to give receipts.

Fines and Recoveries Act.

The Fines and Recoveries Act[1] provides (s. 17), that where any property is sold, the proceeds of which are subject to any trust, the *bonâ fide* purchaser of the property shall not in any case be bound to see to the application of the purchase-money to the purposes of the trust.

Trustees' and Mortgagees' Powers Act.

Act XXVIII of 1866, in cases to which English law is applicable, provides (s. 36), that "the receipts of any trustees or trustee for any money payable to them or him by reason or in the exercise of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof."

To whom purchase-money payable.

The purchase-money should be paid to the vendor personally. An agent or solicitor has no implied authority to receive it, and if the purchaser pays his purchase-money to a person not authorized to receive it, he is liable to pay it over again. The possession of the executed conveyance, with the signed receipt for the consideration-money indorsed, is not of itself an authority to the solicitor of the vendor to receive the purchase-money.[2] Such a receipt is not conclusive evidence of payment.[3]

[1] XXXI of 1851. [2] Viney *v.* Chaplin, 2 DeG. and J., 468.
[3] Winter *v.* Lord Anson, 3 Russ., 488.

LECTURE VIII.

It has been said, that where the vendors sell in a fiduciary character as executors or trustees, they should receive the purchase-money themselves.[1] In *Webb* v. *Ledsam*,[2] however, Wood, V. C., said, that he knew of no authority for holding a man liable to pay over again purchase-money which he had paid to one of several trustees upon a receipt signed by them all.

Charge of debts.

Where there is a charge of debts generally under a will, a purchaser is not bound to see to the application of the purchase-money,[3] nor where there is a charge of debts and legacies;[4] and it is immaterial that there were no debts existing, or that the debts and legacies have been since discharged.[5] "When," said Lord St. Leonards,[6] "a testator, by his will, charges his estate with debts and legacies, he shows that he means to entrust his trustees with the power of receiving the money, anticipating that there will be debts, and thus providing for the payment of them; it is by implication a declaration by the testator that he intends to intrust the trustees with the receipt and application of the money, and not to throw any obligation at all upon the purchaser or mortgagee; that intention does not cease because there are no debts; it remains just as much if there are no debts as if there are debts, because the power arises from the circumstance that the debts are provided for, there being in the very creation of the trust a clear indication amounting to a declaration by the testator that he means that the trustees are alone to receive the money and apply it."

The purchaser will not be bound to see to the application of the purchase-money, even if he knew that there were no debts, if the other purposes of the trust require a sale.[7] And where real estate is directed by will to be sold generally, the proceeds to form part of the personal estate, and subject to debts to be divided, the purchaser is not bound to see to the application of the

[1] Dart V. and P., 602.

[2] 1 K. and J., 388.

[3] Ball *v.* Harris, 4 M. and C., 264; *In re* Langmeads's Trusts, 7 D., M. G., 353.

[4] Eland *v.* Eland, 4 M and Cr., 420.

[5] Rogers *v.* Skillicorne, Amb., 188; Johnson *v.* Kennett, 3 M. and K., 624; Robinson *v.* Lowater, 5 D. M. G., 272.

[6] Stroughill *v.* Anstey, 1 D. M. G., 635.

[7] Eland *v.* Eland, 4 M. and C., 420; Stroughill *v.* Anstey, 1 D. M. G., 635; Howard *v.* Chaffer, 9 Jur., N. S., 767.

purchase-money.[1] But where an estate is directed to be sold and is charged generally with the payment of legacies or specified debts, the purchaser must see to the application of the purchase-money.[2]

The trustee is not bound to give the purchaser any information as to the existence of debts.[3]

Notice of breach of trust.

If the nature of the transaction affords intrinsic evidence that the fiduciary vendor is not acting in the execution of his duty, but is committing a breach of trust, as where the consideration of the mortgage or sale is a personal debt due from the vendor to the purchaser, there the purchaser being a party to the breach of trust does not hold the property discharged from the trusts, but equally subject to the payment of debts and legacies as it would have been in the hands of the executor.[4] And if a purchaser or mortgagee knows that there were no debts existing at the time of the testator's death, or that they have since been paid, leaving only legacies due, and that the money was raised for the private purposes of the parties raising it, he will be postponed to the unpaid legatees.[5]

Where a particular time is fixed for the sale, and the proceeds are divisible among infants or persons then unborn,[6] the purchaser need not see to the application of the purchase-money; nor where it is to be applied upon trusts requiring time for their performance, as where other estates are to be purchased with it,[7] or the trust is for persons not immediately ascertainable, as for instance, creditors coming in after a certain time under a deed.[8] Where there is a charge of debts and power-of-sale in the event of the personal estate proving insufficient, the trustees are not bound to show, nor the purchasers to ascertain, that there is a deficiency.[9]

In the recent case of *Greender Chunder Ghose* v. *Mackintosh*,[10] the question how far lands purchased from a

[1] Smith *v.* Guyon, 1 Bro. C. C., 186.
[2] Smith *v.* Guyon, 1 Bro. C. C., 186; Horn *v.* Horn, 2 S. and S., 448.
[3] Forbes *v.* Peacock 1 Ph., 717; Sabin *v.* Heap, 27 Beav., 553.
[4] Watkins *v.* Cheek, 2 S. and S., 199; Eland *v.* Eland, 4 M. and C., 420; Corser *v.* Cartwright, L. R., 7 H. L., 731.
[5] Howard *v.* Chaffer, 9 Jur., N. S., 767.
[6] Sowarsby *v.* Lacey, 4 Madd., 142; Breedon *v.* Breedon, 1 R. and My., 413.
[7] Doran *v.* Wiltshire, 3 Swanst., 697.
[8] Balfour *v.* Welland, 16 Ves., 151; Groom *v.* Booth, 1 Drew, 548.
[9] Bird *v.* Fox, 11 Hare, 40; Pierce *v.* Scott, 1 Y. and C., Ex., 257.
[10] I. L. R., 4 Calc., 897.

LECTURE VIII.

Hindu devisee are liable in the purchaser's hands for the testator's debts was considered, and Pontifex, J., held, that the question is on the same footing as a similar question would be under the English law.

His Lordship said,[1] that the creditors of the ancestor or testator may "follow his lands into the possession of a purchaser from the heir or devisee if it can be proved that such purchaser knew—(i) that there were debts of the ancestor or testator left unsatisfied; and also (ii) that the heir or devisee to whom he paid his purchase-money intended to apply it otherwise than in the payment of such debts. But a purchaser, ignorant on either of these points, has a safe title, for no duty is cast upon the purchaser from the heir or devisee to enquire whether there are any debts of the ancestor or testator, or to see to the application of his purchase-money. The decision in *Corser* v. *Cartwright*[2] is an authority for this, even in the far stronger case where there is an express charge of debts by the testator on the devised estate, at least when the devisee is also executor, for the Lord Chancellor cautiously confined his judgment to the case before him, and it is also an authority to show that even where there is an express charge of debts, the burden of proof is entirely on the creditor to show that the purchaser from the devisee had notice that the latter intended to misapply the purchase-money."[3]

Suspension of trustee's powers after decree.

After a suit has been instituted for the purpose of administering the trust, and a decree has been made, the trustees cannot act on their own responsibility, but must come to the Court, whenever they have to do any acts regarding the property.[4] They cannot commence or defend any suit without the leave of the Court;[5] nor can trustees for sale sell.[6] And an executor cannot pay debts, or invest his testator's assets.[8] But it has never been decided that an executor after the institution of a suit

[1] Page 906.
[2] L. R., 7 H. L., 731.
[3] See further as to trustee's receipts, Lewin, 7th Edn., 407—438.
[4] Mitchelson *v.* Piper, 8 Sim., 64; Shewen *v.* Vanderhorst, 1 R. and M., 347; S. C., 2 R. and M., 75; Minors *v.* Battison, L. R., 1 App. Cas., 428.
[5] Jones *v.* Powell, 4 Beav., 96.
[6] Walker *v.* Smallwood, Ambl., 676; Annersley *v.* Ashurst, 3 P. Wms., 282.
[7] Mitchelson *v.* Piper, 8 Sim., 64; Irby *v.* Irby., 24 Beav, 525.
[8] Widdowson *v.* Duck, 3 Mer., 494; Bethell *v.* Abraham, L. R., 17 Eq., 24.

cannot sign a valid receipt for any part of the testator's personal estate.[1] A decree must have been made in the suit. The reason of this rule is, that the plaintiff may, at any time before decree, withdraw his suit;[2] and should he do so, the progress of the trust may have been arrested for no purpose. Still it is safer for the trustees, after a suit has been instituted, not to act without the leave of the Court; and if, by acting independently of the Court, expenses be incurred, which might have been avoided had the trustees applied to the Court, they may be made to bear them personally.[3]

[1] Lewin, 7th Ed., 516. [2] See Act X of 1877, s. 373.
[3] Lewin, 7th Ed., 516.

LECTURE IX.

DISABILITIES OF TRUSTEES.

Trustee cannot renounce after acceptance — Trustee cannot delegate — Employment of solicitor to invest — Delegation to co-trustee or co-executor — Necessary delegation — Co-executor — Delegation authorized by author of trust — Representatives of surviving trustee — Fraud by co-trustee — Discretionary trust — Ministerial acts — Liability of agent — Co-trustees cannot act singly — All trustees must join in receipt and conveyance — Proof in insolvency — Exception to rule in case of public trust — Special power — Acknowledgment — Costs of acting independently — Injunction — Remuneration for trouble — Carrying on business — Surviving partner trustee — Solicitor trustee — Extent of charge allowed — Costs — Trustee appointed by Court — Professional charges not allowed — Settled account — Remuneration fixed by author of trust — Contract for remuneration with *cestuis que trustent* — Gift coupled with duty — Expenses of agent — Curators under Act XIX of 1841 and Act XL of 1858 — Official Trustee — Administrator-General — Trustee may not make a profit from his office — Employing trust-funds in trade — Compounding debts or mortgages and purchasing — Purchase for benefit of *cestui que trust* — *Cestui que trust* cannot give to trustee — Rule applies to all fiduciary relations — Partners — Purchasing share of deceased partner — Instances of rule — Trustee retiring for a consideration — Extent of liability — Failure of heirs of *cestui que trust* — Failure of next-of-kin — Trustee for sale cannot purchase — Trustee purchasing from himself — That price fair immaterial — So nature of property, or mode of purchase — Trustee who has never acted — When *cestui que trust* may set aside sale — Trustee may not buy for another — Agent of trustee may not purchase — Trustee taking lease — Time within which sale must be set aside — Confirmation — Purchase from *cestui que trust* — Fiduciary relation dissolved — Burden of proof — Purchase by creditors — Assignee — Leave to bid — Purchase from infants — Legal representatives — Mortgagee — Lending to trustees.

Trustee cannot renounce after acceptance.

AFTER a trustee has once accepted the trust, either expressly or impliedly, he cannot, by any act of his own, without communication with his *cestui que trust*, denude himself of the character of trustee until he has performed his trust;[1] any subsequent renunciation will be void.[2] Thus, the trustee of a temple cannot alienate the trust-property subject to the trusts attaching to it, and so get rid of the

[1] Chalmer *v.* Bradley, 1 Jac. & W., 68.
[2] Read *v.* Truelove, Ambl., 417.

office.[1] The only way in which a trustee can obtain a release from the office is by obtaining his discharge from the Court,[2] or, if all the *cestuis que trustent* are competent to contract, by obtaining their consent to his renunciation; or by retiring under a special power in the instrument of trust. With the subject of appointments of new trustees I shall deal hereafter. Thus, where *A* was named executor in a will, and acted on behalf of particular legatees, disclaiming an intention of interfering generally, and afterwards renounced in favour of *B*, who was named a trustee in the same will, and who thereupon obtained administration with the will annexed; and *B* subsequently died insolvent after having possessed himself of the assets,—it was held, that *A* was liable as executor notwithstanding his renunciation, and was answerable for the acts of *B*. "Executors," said Lord Redesdale, "must either wholly renounce, or if they act to a certain extent as executors, and take upon them that character, they can be discharged only by administering the effects themselves, or by putting the administration into the hands of a Court of Equity."[3] Where a trustee gave a bond to convey trust-property, and the administrator of the *cestui que trust* sued upon the bond and recovered the penalty, it was held, nevertheless, upon a bill to compel a conveyance, that the trustee was liable to carry out the trust upon the penalty being refunded with interest.[4]

Trustee cannot delegate.

As a general rule, a trustee cannot delegate his office. If he does so, he will be liable for any breach of trust committed by the person to whom the office has been entrusted, for trustees cannot divest themselves of their trust at their pleasure.[5] "Trustees," said Lord Langdale,[6] "who take on themselves the management of property for the benefit of others, have no right to shift their duties on other persons; and if they employ an agent, they remain subject to responsibility towards their *cestui que trust*, for whom they have undertaken the duty." In that case the

[1] Rajah of Kovilagom *v.* Kottayath, 7 Mad. H. C. R., 210.
[2] Doyle *v.* Blake, 2 Sch. & Lef., 245.
[3] Doyle *v.* Blake, 2 Sch. & Lef., 231: see also Lowry *v.* Fulton, 9 Sim., 104; Belchior Francisco Ferras *v.* Roque Mariano Dos Angos, 9 S. D. A., 921.
[4] Moorecroft *v.* Dowding, 2 P. Wms., 314.
[5] Bradwell *v.* Catchpole, 3 Swanst., 79 (*n*).
[6] Turner *v.* Corney, 5 Beav., 517.

LECTURE IX.

trustees were empowered by the trust-deed to employ an agent, and the decree directed an enquiry as to whether it was by the neglect or default of the trustees that they were unable to render a better account. And in a subsequent case[1] Lord Langdale said: "In cases of breach of trust, it is of great importance to the community that trustees, who take on themselves the protection of the property of others, should be made to feel that they will be held liable for trust-property which is lost by their acts of omission or commission, and that such liability will be enforced against them."

Employment of solicitor to invest.

Trustees have been held liable when they have employed their solicitors to invest the trust-fund, and it has been lost through the fraudulent acts of the persons employed. "If," said Lord Eldon,[2] "a trustee trusts an attorney, he must abide by the effect of that confidence." And it is no defence that, in the employment of the solicitor, ordinary care and discretion was exercised.[3] In one case trustees were held liable for lending money on the valuation of the mortgagor's agent without looking into the matter themselves.[4]

Delegation to co-trustee or co-executor.

If trustees or executors delegate the execution of the trust or the distribution of the assets to one of their own number, and a loss ensues through his wrongful act, they will be liable, for it is the duty of each trustee or executor to watch over the trust-property.[5]

But where an executor who had proved, but never acted, received a bill of exchange by post on account of the estate, and immediately sent it to the acting executor, and it was lost,—it was held, that the first executor was not liable, as he had never acted in the trust.[6]

Necessary delegation.

In *Ex parte Belchier*[7] it was sought to make the assignee of a bankrupt liable for the default of a broker, who had been employed to sell some of the bankrupt's property. Lord Hardwicke said: "If the assignee is chargeable

[1] Ghost *v.* Waller, 9 Beav., 497.

[2] Chambers *v.* Minchin, 7 Ves., 196.

[3] Bostock *v.* Floyer, L. R., 1 Eq., 26. See also Griffiths *v.* Porter, 25 Beav., 236; Ingle *v.* Partridge, 32 Beav., 661; Wood *v.* Weightman, L. R., 13 Eq., 434; *In re* Bird, L. R., 16 Eq., 203. As to liability of an assignee in bankruptcy for loss caused by acts of an attorney empowered to recover debt, see Lewin, 7th Edn., 234.

[4] Ingle *v.* Partridge, 34 Beav., 411.

[5] Langford *v.* Gascoyne, 11 Ves., 333; Davis *v.* Spurling, 1 R. & M., 66; Clough *v.* Bond, 3 M. & Cr., 497; Eaves *v.* Hickson, 30 Beav., 136.

[6] Balchen *v.* Scott, 2 Ves. Jr., 678.

[7] Amb., 218.

in this case, no man in his senses would act as assignee under commissions of bankrupt. This Court has laid down a rule with regard to the transactions of assignees, and more so of trustees, so as not to strike a terror into mankind acting for the benefit of others, and not for their own. Courts of Law, and Equity too, are more strict as to executors and administrators; but where trustees act by other hands, either from necessity, or conformable to the common usage of mankind, they are not answerable for losses. There are two sorts of necessities: *first*, legal necessity; *secondly*, moral necessity. As to the first, a distinction prevails where two executors join in giving a discharge for money, and one of them only receives it, they are both answerable for it, because there is no necessity for both to join in the discharge, the receipt of either being sufficient; but if trustees join in giving a discharge, and one only receives, the other is not answerable, because his joining in the discharge was necessary.

"Moral necessity, from the usage of mankind. If a trustee acts as prudently for the trust as for himself and according to the usage of business, he will not be liable.

"If a trustee appoints rents to be paid to a banker at that time in credit, and the banker afterwards breaks, the trustee is not answerable. So, in the employment of stewards and agents, the receiver of Lord Plymouth's estate[1] took bills in the country of persons who at the time were reputed of credit and substance, in order to return the rents to London: the bills were protested and the money lost, and yet the steward was excused. None of these cases are on account of necessity, but because the persons acted in the usual method of business."[2]

Co-executor.

Where an executor possessing assets of his testator hands over the assets to a co-executor, and they are misapplied by him, the executor who so hands them over will be answerable for their misapplication, because he had a legal right to retain them, and might have preserved them, and it was his duty to do so; unless, indeed, they were so handed over for the express purpose of a special administration by the co-executor as for the payment of a particular debt.[3]

[1] Knight *v.* The Earl of Plymouth, 1 Dick, 120.

[2] See *ante*, p. 140; and also Wren *v.* Kirton, 11 Ves., 377; Massey *v.* Banner, 1 J. and W., 248; Joy *v.* Campbell, 1 Sch. and Lef., 341.

[3] Davis *v.* Spurling, 1 R. and M., 66: and see Trutch *v.* Lamprell, 20 Beav., 116; Thompson *v.* Finch, 22 Beav., 316; 8 D. M. G., 560; Cowell Gatcombe, 27 Beav, 568.

LECTURE IX.

Delegation authorized by author of trust.

But trustees cannot be answerable, if the instrument of trust provides for delegation, and they follow the directions given by it. Thus, a testator by his will recommended his executors to employ *A* (who had been in the testator's own employment) as their clerk or agent. The executors gave *A* a power-of-attorney to receive debts, and *A* subsequently became insolvent. It was contended that the executors were answerable for the default of *A*; but Sir A. Hart said, that if a testator pointed out an agent to be employed by the executor, and such employee received a sum of money, and immediately made default, the executor would clear himself by showing that the testator designated the person, and that he could not by the exercise of reasonable diligence recover the money.[1]

Representatives of surviving trustee.

Again, where property was bequeathed to trustees upon certain trusts, to be executed by them or the survivor of them, or the assigns of such survivor, and one of the trustees died,—it was held, that the survivor might bequeath the trust-property to trustees upon the trusts of the original will.[2] "Where," said Lord Langdale, "a trust-estate is limited to several trustees and the survivor of them, and the heirs of the survivor, and no power of appointing new trustees is given, we observe a personal confidence given, or at least probably given, to every one of the several trustees, as any one may be the survivor; the whole power will eventually come to that one, and he is entrusted with it, and being so, he is not, without a special power to assign it to any other, he cannot of his own authority, during his own life, relieve himself from the duties and responsibilities which he has undertaken.

"But we cannot assume that the author of the trust placed any personal confidence in the heir of the survivor; it cannot be known beforehand which one of the several trustees may be the survivor; and as to the contingent survivor, it cannot be known beforehand whether he may have an heir or not, or whether the heir may be one, or may consist of many persons, trustworthy or not, married women, infants, or bankrupts, within or without the jurisdiction. The reasons, therefore, which

[1] Lewin, 7th Ed., 245, citing Kilbee *v.* Sneyd, 2 Moll., 199; Doyle *v.* Blake, 2 Sch. and Lef., 232, 239.

[2] Titley *v.* Wolstenholme, 7 Beav., 424.

forbid the surviving trustee from making an assignment, *inter vivos*, in such a case, do not seem to apply to an assignment by devise or bequest; which being made to take effect only after the death of the last surviving trustee, and consequently after the expiration of all personal confidence, may perhaps not improperly be considered as made without any violation or breach of trust. It is to take effect only at a time when there must be a substitution or change of trustees,—there must be a devolution or transmission of the estate to some one or more persons not immediately or directly trusted by the author of the trust,—and the estate subject to the trusts must pass either to the *hæres natus* or *hæres factus* of the surviving trustee, and if the heir or heirs-at-law, whatever may be their situation, condition, or number, must be the substituted trustee or trustees, the greatest inconvenience may arise, and there are no means of obviating them other than by an application to the Court. With great respect to those who think otherwise, and quite aware that some inconveniences which can only be obviated in the Court may arise from devising trust-estates to improper persons for improper purposes, I cannot at present see my way to the conclusion, that in the case contemplated, the surviving trustee commits a breach of trust by not permitting the trust-estate to descend, or by devising it to proper persons, on the trusts to which it was subject in the hands of the surviving trustees."

Fraud by co-trustee.

And trustees are not liable to their *cestuis que trustent* for money belonging to the trust which a co-trustee gets into his possession without their consent or knowledge and by a fraud upon them. Thus, where trustees drew a cheque upon a banker, and crossed the cheque with the names of other bankers, and delivered it over to one of their number for the purpose of paying it into the bank of the bankers with whose name the cheque was crossed, it was held, that the co-trustees were not liable for the misapplication of the money by the trustee to whom the cheque was delivered.[1]

Discretionary trust.

If the trust is of a discretionary character, a trustee cannot delegate the execution of it under any circumstances either to a stranger or to a co-trustee, or co-executor, and not only will the trustee so delegating be liable for any

[1] Barnard *v.* Bagshaw, 3 DeG. J. and S., 355.

LECTURE IX.

loss, but the exercise of the discretion by the substitute will be actually void.[1]

Ministerial acts.

A trustee may carry out the ministerial portion of an act connected with the trust by attorney or proxy; for instance, if he has agreed to sell the trust-property, he may execute the instrument transferring the property by his attorney, for he does not delegate any portion of the confidence reposed in him.[2]

Liability of agent.

The agent of a trustee is not accountable to the *cestuis que trustent*, though a substituted trustee is,[3] and payment to an agent authorized by trustees to receive trust-moneys discharges the person paying the money.[4] An agent who has been party to a breach of trust, will, however, be responsible to the *cestuis que trustent*.[5]

Co-trustees cannot act singly.

The office of co-trustees is joint, they all form as it were one collective trustee, and therefore must execute the duties of their office in their joint capacity.[6] An act done by one may be subsequently approved by the other; but the approval must be strictly proved.[7] It is not uncommon to hear one of several trustees spoken of as the *acting* trustee, but the Court knows of no such distinction; all who accept the office are in the eye of the law acting trustees. During the joint lives of the trustees if one refuse to act, the other cannot act without him; but the trust devolves upon the Court.[8]

All trustees must join in receipt

It follows from this doctrine of unity among co-trustees, that they must all join in giving a receipt; and that, unless the instrument of trust specially provides that the receipt of some or one of the trustees shall be a discharge, a receipt not signed by all will be invalid.[9] So they must all join in a conveyance of the trust-estate.[10]

and conveyance.

[1] Alexander *v.* Alexander, 2 Ves., 643; Bradford *v.* Belfield, 2 Sim., 264; Hitch *v.* Leworthy, 2 Hare, 200; Crewe *v.* Dicken, 4 Ves., 97; Attorney-General *v.* Glegg, 1 Atk., 356.

[2] Attorney-General *v.* Scott, 1 Ves. Sr., 413; *Ex parte* Rigby, 19 Ves., 463.

[3] Myler *v.* Fitzpatrick, 6 Madd., 360; Maw *v.* Pearson, 28 Beav., 196.

[4] Robertson *v.* Armstrong, 28 Beav., 123.

[5] Fyler *v.* Fyler, 3 Beav, 550.

[6] Lewin, 7th Edn., citing *Ex parte* Griffin, 2 Gl. and J, 116.

[7] Messeena *v.* Carr, L. R., 9 Eq., 260; Lee *v.* Sankey, L. R., 15 Eq., 204.

[8] Doyly *v.* Sherratt, 2 Eq. Cas. Abr, 742 D.

[9] See *ante*, p. 194; and Walker *v.* Symonds, 3 Swanst., 63; Hall *v.* Franck, 11 Beav., 519; Lee *v.* Sankey, L. R., 15 Eq., 204.

[10] Townley *v.* Sherborne, Bridg., 35.

If there are many trustees, the Court will order that the trust-moneys may be paid to them or any two of them.[1]

Proof in insolvency.

One of several executors may, on the insolvency of a debtor to the estate, prove the debt; but one of several trustees cannot prove without the order of the Court.[2]

Exception to rule in case of public trust.

There is an exception to the general rule that all trustees must join in executing the office, in the case of a trust of a public character. There the act of the majority is to be considered the act of the whole body.[3] The majority of course have no right to deal with the trust-property otherwise than according to the true construction of the deed of trust.[4]

Special power.

Where a special power is given to trustees, it cannot be exercised by the majority only, but all must join; if the settlement, for instance, declares that, on the death or resignation of a trustee, the surviving or continuing trustees shall appoint a successor, it is apprehended that the appointment of the new trustee must be the joint act of all the surviving or continuing trustees.[5]

Acknowledgment.

The Limitation Act[6] provides, that nothing in ss. 19 and 20 renders one of several joint executors or mortgagees chargeable by reason only of a written acknowledgment signed, or of a payment made by, or by the agent of, any other or others of them. This, corresponds with the English law.[7]

Costs of acting independently.

"As co-trustees are a joint body, the Court requires them, unless under special circumstances, to defend a suit jointly; and if they sever, the extra costs thereby occasioned must be borne by the defaulting party. It is conceived that this rule, so strictly observed in Court, must not be lost sight of in transactions out of Court, and that co-trustees are bound, unless they can show good reason to the contrary, to act by the same solicitor and the same counsel. It would be a strange anomaly if four trustees were allowed only one solicitor and one counsel in Court, and four separate solicitors and four separate counsel out of Court.

[1] Attorney-General *v.* Brickdale, 8 Beav., 223.
[2] *Ex parte* Smith, 1 Deac., 391.
[3] Wilkinson *v.* Malin, 2 Tyr., 544; Younger *v.* Welham, 3 Swanst., 180.
[4] Ward *v.* Hipwell, 3 Giff., 547.
[5] Lewin, 7th Edn., 237, citing *Re* Congregational Church, Smethwick, 1 W. N., 196. As to stock in the name of trustees, see Lewin, 238.
[6] XV of 1877, s. 21.
[7] See Richardson *v.* Younge, L R., 6 Ch., 478.

LECTURE IX.

Every trustee should be prepared to act in harmony with his co-trustees, or he should not accept the office. It may be said that as each trustee is responsible for the due administration of the trust, he ought to be at liberty to employ a professional adviser of his own choosing, but this argument would, *à fortiori*, apply to so important a matter as the defence of a suit, and yet there the Court pays no attention to it." [1]

We have seen that the Court will not, as a rule, interfere with a discretionary power reposed in trustees, *ante*, p. 153. But the Court has a controlling power over all trustees,[2] and will interfere when the discretion is mischievously and ruinously exercised, as by leaving the trust-fund outstanding on hazardous securities,[3] or where it is corruptly exercised,[4] or not exercised in good faith,[5] or where the trustees misbehave,[6] or decline to exercise the discretion.[7] In this last case the Court will not, as a matter of course, exercise the discretion with which the trustees are invested, but will follow its own established and known rules, unless the intention of the testator plainly appears to exclude such a mode of proceeding.[8] Where a case has been shown for bringing the trustees before the Court, the Court, though it will not control the discretion of the trustees, will still, to use the words of Lord Hardwicke, "keep a hand over them." [9]

Injunction.

The Court may, if necessary, interfere by injunction.[10] If the act complained of would be irremediable, the Court will interfere as a matter of course.[11]

Remuneration for trouble.

A trustee, as such, has no right to any remuneration for his trouble, skill, or loss of time in executing the trust, for the office, in the absence of any express stipulations between the author of the trust and the trustee, is a purely honor-

[1] Lewin, 7th Edn., 238.
[2] *In re* Hodges, Davey *v.* Ward, L. R, 7 Ch. Div., 761.
[3] De Manneville *v.* Crompton, 1 V. and B., 359.
[4] Potter *v.* Chapman, Ambl., 99; French *v.* Davidson, 3 Madd., 402; Talbot *v.* Marshfield, L. R., 3 Ch., 622; Thacker *v.* Key, L. R., 8 Eq., 408.
[5] Byam *v.* Byam, 19 Beav., 65; *Re* Wilkes's Charity, 3 Mac. and G., 440.
[6] Attorney-General *v.* Glegg, Ambl., 584.
[7] Gude *v.* Worthington, 3 DeG. and Sm., 389; *In re* Sanderson's Trusts, 3 K. and J., 497.
[8] Prendergast *v.* Prendergast, 3 H. L. C., 197.
[9] Attorney-General *v.* Governors of Harrow School, 2 Ves., 551.
[10] Balls *v.* Strutt, 1 Hare, 146; M'Fadden *v.* Jenkyns, 1 Ph., 153.
[11] *In re* Chertsey Market, 6 Price, 279; and see Kerr on Injunctions, 2nd Edn., 461.

ary one. The leading case on this point is *Robinson* v. *Pett*.[1] There Lord Talbot, L. C., said: "It is an established rule, that a trustee, executor, or administrator shall have no allowance for his care and trouble; the reason of which seems to be, for that, on these pretences if allowed, the trust-estate might be loaded and rendered of little value: besides, the great difficulty there might be in settling and adjusting the *quantum* of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon any trustee who may choose whether he will accept the trust or not."

"The reason of the rule," said Lord Cottenham,[2] "is well stated in *Robinson* v. *Pett*. It is not because the trust-estate is in any particular case charged with more than it might otherwise have to bear, but that the principle, if allowed, would lead to such consequences in general."[3] "The true ground, however," says Mr. Lewin,[4] "is, that if the trustee were allowed to perform the duties of the office, and to claim compensation for his services, his interest would be opposed to his duty, and as a matter of prudence, the Court would not allow a trustee or executor to place himself in such a false position."[5]

The rule extends to all persons who acquire a fiduciary character. Thus, an agent who becomes executor is not entitled to charge commission on business done subsequently to the testator's death,[6] nor if he sells as trustee will he be allowed more than expenses out of pocket.[7] So an auctioneer, who is also mortgagee, cannot charge commission for selling the mortgaged property;[8] and it is a general rule that a mortgagee shall not be allowed to charge for receiving the rents of the mortgaged property personally.[9] A receiver is not entitled to compensation for trouble in doing acts which have not been ordered.[10] Nor is the committee of a lunatic's estate entitled to any remu-

[1] 3 P. Wms., 132.
[2] Moore *v.* Frowd, 3 My. and Cr., 50.
[3] See also Hamilton *v.* Wright, 9 C. and F., 111.
[4] 7th Edn., 537.
[5] And see Burton *v.* Wookey, 6 Madd., 368.
[6] Sheriff *v.* Axe, 4 Russ., 33.
[7] Kirkman *v.* Booth, 11 Beav., 273; Arnold *v.* Garner, 2 Ph., 231.
[8] Matthison *v.* Clarke, 3 Drew., 3.
[9] Bonithon *v.* Hockmore, 1 Vern., 316; Langstaffe *v.* Fenwick, 10 Ves., 405; Nicholson *v.* Tutin, 3 K. and J., 159.
[10] *In re* Ormsby, 1 B. and B., 189.

LECTURE IX

neration for his trouble. Where any allowance is made, it is not for his sake, but for the benefit of the estate, as where rents cannot be effectually collected by the committee without assistance.[1]

Carrying on business.

If a surviving partner carries on the business of the partnership retaining the deceased partner's capital in the concern, he will be considered as a constructive trustee, and will have to account for the profits; but proper allowances will be made for the management of the business,[2] and the amount of the allowances may be fixed by the Court without an enquiry.[3]

Surviving partner trustee.

If, however, the surviving partner is an express trustee or an executor, he will not, as a general rule, in the absence of any direct stipulation, be entitled to an allowance for carrying on the business,[4] or to make any charge for his trouble or loss of time, although great advantages may have accrued to his *cestuis que trustent;* as where he has carried on a trade or business with great personal trouble, and at a great sacrifice of time, he will not be allowed to charge for more than out-of-pocket expenses: and even settled accounts upon the footing of such charges will be set aside.[5]

Solicitor trustee.

A solicitor who sustains the character of trustee will not, unless there be an agreement for the purpose,[6] be permitted to charge for his time, trouble or attendance, but only for his actual disbursements.[7] "It would," said Lord Lyndhurst, "be placing his interest at variance with the duties he has to discharge. It is said, the bill may be taxed, but that would not be a sufficient check: the estate has a right not only to the protection of the taxing officer, but also to the vigilance and guardianship of the executor or trustee: a trustee placed in the situation of a solicitor

[1] *Re* Walker, 2 Phillips, 630; *Re* Westbrooke, *ib.*, 631; *Anon.*, 10 Ves., 103.

[2] Crawshay *v.* Collins, 15 Ves., 225; Brown *v.* De Tastet, Jac., 284; Wedderburn *v.* Wedderburn, 22 Beav., 117.

[3] Forster *v.* Ridley, 4 DeG. J. and S., 452.

[4] Burden *v.* Burden, 1 V. and B., 170; Brocksopp *v.* Barnes, 5 Madd., 90; Stocken *v.* Dawson, 6 Beav., 371.

[5] Brocksopp *v.* Barnes, 5 Madd., 90; Ayliffe *v.* Murray, 2 Atk., 58; Barrett *v.* Hartley, L. R., 2 Eq., 789.

[6] *In re* Sherwood, 3 Beav., 338.

[7] Gomley *v.* Wood, 3 J. and Lat., 678; Moore *v.* Frowd. 3 M. and Cr., 45; Fraser *v.* Palmer, 4 Y. and C., 515; Broughton *v.* Broughton, 5 D. M. G., 160.

might, if allowed to perform the duties of a solicitor and to be paid for them, find it very often proper to institute and carry on legal proceedings, which he would not do if he were to derive no emolument from them himself, and if he were to employ another person."[1] And the rule is not restricted to cases of express trusts, but applies to the case of an executor or trustee, though there be no express trust.[2]

Extent of charge allowed.

When a solicitor has liberty to charge for his professional services, he can only charge for services strictly professional, and not for matters which an executor ought to have done without the intervention of a solicitor, such as attendance to pay premiums on policies, attending at the bank to make transfers, attendances on auctioneers, legatees, and creditors.[3] The rule applies even where the business is done by the solicitor's partner, who is not a trustee.[4] If, however, the business is done exclusively by the partner and he alone receives the costs to the exclusion of the trustee-partner, the charge will be allowed;[5] and so will the costs of an agent, also a solicitor, for professional work.[6] In one case it was held, that a solicitor, a trustee, might act for his *cestuis que trustent* or himself, and his co-trustees or *cestuis que trustent*, provided the costs were not increased thereby.[7] But this case has been since disapproved of by the House of Lords in *Manson* v. *Baillie*,[8] where Lord Cranworth, C., said, that "the true principle is, that each trustee should be a check and control on each and all of the co-trustees—a principle which is placed in danger by the allowance of a pecuniary profit."

And in another case,[9] Lord Cranworth said: "The rule applicable to the subject has been treated at the bar, as if it were sufficiently enunciated, by saying, that a trustee shall not be able to make a profit of his trust; but that is not stating it so widely as it ought to be stated. The

[1] Lewin, 7th Edn., 540, citing New *v.* Jones, 9 Jarm. Prec., 338.
[2] Pollard *v.* Doyle, 1 Dr. and Sm., 319.
[3] Harbin *v.* Darby, 28 Beav., 325.
[4] Collins *v.* Cary, 2 Beav., 129; Christopher *v.* White, 10 Beav., 523; Lincoln *v.* Windsor, 9 Hare, 158; Lyon *v.* Baker, 5 DeG. and Sm., 622; Cradock *v.* Piper, 1 Mac. and G., 664.
[5] Clacke *v.* Carlon, 7 Jur., N. S., 441; Mackintosh *v.* Nobinmoney Dossee, 2 Ind. Jur., 162.
[6] Burge *v.* Brutton, 2 Hare, 373.
[7] Cradock *v.* Piper, 1 Mac. and G., 664.
[8] 2 Macq., 80.
[9] Broughton *v.* Broughton, 5 D. M. G., 164.

LECTURE IX.

rule really is, that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty, and a case for the application of the rule is that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for doing them. As the trustee might make the payment to others, this Court says, he shall not make it to himself; and it says the same in the case of agents, where they may employ others under them. The good sense of the rule is obvious, because it is one of the duties of a trustee to take care that no improper charges are made by persons employed for the estate."

In *In the Matter of the Port Canning Land Co.*,[1] Phear, J., drew a distinction between the case of a trustee and a director of a public company, and allowed the claim of the partner of one of the directors who did work for the company as a solicitor, there being nothing to show that he had not been duly appointed by the directors.

A solicitor, who is also a trustee, who invests trust-money on a mortgage, and is employed as the mortgagor's solicitor, and is paid by him, is not chargeable at the suit of the *cestui que trust* with the profit thus made.[2]

Costs.

A solicitort-rustee, who acts for himself in a suit, will be entitled to his costs against parties who unsuccessfully attempt to set aside the trust-deed.[3]

Securities given to a solicitor-trustee to cover costs to which he would not be entitled, will be set aside even as against a purchaser for value who had notice.[4]

Trustee appointed by Court.

Where a trustee is appointed by the Court, and the nature of the trust is such that he is fairly entitled to compensation, he should take care to arrange for his remuneration before he accepts the office.[5] In *Marshall* v. *Holloway*,[6] the decree, after reciting that the nature and circumstances of the estate of the testator required the application of a great proportion of time by and on the part of the trustees for the due execution of the trusts of his will in regard to his estate, and that they could not

[1] 6 B. L. R., 278.
[2] Whitney *v.* Smith, L. R., 4 Ch., 513.
[3] Pince *v.* Beattie, 9 Jur., N. S., 1119; see York *v.* Brown, 1 Coll., 260.
[4] Gomley *v.* Wood, 3 J. and Lat., 678.
[5] Brocksopp *v.* Barnes. 5 Madd., 90; Morison *v.* Morison, 4 M. and C., 215; Newport *v.* Bury, 23 Beav., 30.
[6] 2 Swanst., 453.

undertake to continue the execution of the trusts without the aid and assistance of *A* as a co-trustee, he having during the life of the testator had the principal and confidential management thereof, and being better acquainted therewith than any other person, and that therefore it would be for the benefit of the said testator's estate that he should continue to be a trustee thereof, and the said *A* alleging that due attention to the affairs and concerns of the said testator would require so much of his time and attention as would be greatly prejudicial to his other pursuits and concerns in business, and therefore that he would not have undertaken to act therein, but under the assurance that an application would be made to the Court to authorize the allowance and payment of a reasonable compensation out of the testator's estate for such his labour and time, and that he could not continue to act therein without such reasonable allowance being made to him, ordered a reference to settle a reasonable allowance to be made to *A* out of the testator's estate for his time, pains, and trouble in the execution of the trusts.

Professional charges not allowed.

The Court will not allow a trustee to make professional charges for professional business done by him for the trust, unless, of course, there is express authority given by the settlor, for, to do so would be to place a person, having a duty conflicting with his interest, in the position of having to make out his own bill against himself, leaving any error which might occur to be settled and set right at some future occasion; but the Court will only allow him a salary.[1]

Settled account.

A *cestui que trust* is not estopped by a settled account with or release to his trustee, a solicitor, if he had no independent legal advice;[2] but otherwise if he had.[3]

Remuneration fixed by author of trust.

The author of the trust himself may, of course, direct a salary or other payment, or costs as between solicitor and client, to be made to the trustee, to which he would not be entitled without such direction;[4] and if the precise amount is not fixed, an enquiry will be directed to ascertain what will be a proper remuneration.[5]

[1] Bainbrigge *v.* Blair, 8 Beav., 595.
[2] Todd *v.* Wilson, 9 Beav., 486.
[3] Stanes *v.* Parker, 9 Beav., 385; *Re* Wyche, 11 Beav., 209.
[4] Robinson *v.* Pett, 1 P. Wms., 132; Webb *v* Earl of Shaftesbury, 7 Ves., 480; Baker *v.* Martin, 8 Sim., 25; Douglas *v.* Archbutt, 2 DeG. and J., 148.
[5] Ellison *v.* Airey, 1 Ves., 115; Willis *v.* Kibble, 1 Beav., 559; Jackson *v.* Hamilton, 3 J. and Lat., 702.

LECTURE IX.

Contract for remuneration with *cestuis que trustent.*

And where the instrument of trust does not make any provision for the remuneration of the trustees; they may, nevertheless, contract with the *cestuis que trustent*, if the latter are competent to contract, for an allowance for time and trouble expended in the administration of the trust.[1] In *Ayliffe* v. *Murray*,[2] Lord Hardwicke said: "Whether upon general grounds a trustee may make an agreement with his *cestui que trust* for an extraordinary allowance, over and above what he is allowed by the terms of the trust, I think there may be cases where this Court would establish such agreements, but at the same time would be extremely cautious and wary in doing it. In general, this Court looks upon trusts as honorary, and a burthen upon the honour and conscience of the person intrusted, and not undertaken upon mercenary views; and there is a strong reason too against allowing anything beyond the terms of the trust, because it gives an undue advantage to a trustee to distress a *cestui que trust*, and therefore this Court has always held a strict hand upon trustees in this particular. If a trustee comes in a fair and open manner, and tells the *cestui que trust* that he will not act in such a troublesome and burthensome office, unless the *cestui que trust* will give him a further compensation, over and above the terms of the trust ,and it is contracted for between them, I will not say this Court will set it aside, though there is no instance where they have confirmed such a bargain."

The contract should in its terms explain the arrangement, and if the trustee is a solicitor, the *cestui que trust* should have independent professional advice.[3]

If the trustee fail from any cause to perform his part of the contract, the charges will not be allowed.[4]

Gift coupled with duty.

If a gift is coupled with a duty, the duty must be performed in order to entitle the donee to claim the gift. Thus, if a bequest is given to an executor as remuneration for his trouble, he will not be entitled to claim it unless he proves the will and acts,[5] even though he is prevented by the act of God, as in the case of severe illness, from taking out probate.[6] So a gift of an annuity to a trustee,

[1] Douglas *v.* Archbutt, 2 DeG. and J., 148.
[2] 2 Atk., 58.
[3] Moore *v.* Frowd, 3 M. and Cr., 46.
[4] Gould *v.* Fleetwood. 3 P. Wms., 251, *n.* (*a*).
[5] Slaney *v.* Watney, L. R., 2 Eq., 418.
[6] Hanbury *v.* Spooner, 5 Beav., 630; *Re* Hawkins Trusts, 33 Beav., 570.

so long as he shall continue in the office of trustee, will determine on the cesser of active trusts by the payment of the whole of the trust-property to a person absolutely entitled, without a devolution of the office of trustee on any other person.[1]

Expenses of agent.

Although a person acting in a fiduciary capacity may not charge anything for his trouble, yet he may, as we have already seen,[2] employ paid agents. So if an executor employs a solicitor to do business for him in the management of the testator's affairs, he will be allowed what he pays the solicitor for such business,[3] unless the business is such as he should have transacted himself.[4]

If the accounts be complicated, and the executor or trustee take upon himself to adjust and settle them, although it may take up a great deal of his time and attention, the principle of equity is, that he cannot claim compensation; but if he choose to save his own trouble by the employment of an accountant, he is entitled to charge the trust-estate with it under the head of expenses.[5]

Curators under Act XIX of 1841

Curators appointed under Act XIX of 1841 are allowed to receive remuneration at such rate as the Judge shall think reasonable, but in no case exceeding 5 per cent on the personal property and on the annual profits of the real property of the person whose estate has been taken charge of (s. 7). And the public curator and every other administrator to whom a certificate has been granted under s. 10 of Act XL of 1858 is entitled to commission at a rate not exceeding 5 per cent on the sums received and disbursed by him, or such other allowance to be paid out of the minor's estate as the Civil Court shall think fit (s. 24).

and Act XL of 1858.

Official Trustee.

The Official Trustee is entitled by way of remuneration in respect of all trust-property in his hands to commission on all capital moneys received by him, of one and-a-half per cent on receipt; on all capital moneys invested by him, a commission of one and-a-half per cent on investment; on all sums received by him by way of interest or dividends in respect of moneys invested, a commission of

[1] Hull *v.* Christian, L. R., 17 Eq., 546.
[2] *Ante*, p. 212.
[3] Macnamara *v.* Jones, 2 Dick, 587.
[4] Harbin *v.* Darby, 28 Beav., 325.
[5] Lewin, 7th Edn., 543, citing New *v.* Jones, 9 Jarm. Prec., 338; Henderson *v.* McIver, 3 Mad., 275.

LECTURE IX.

three quarter per cent, and on all rents collected by him, a commission of two and-a-half per cent. (Act XVII of 1864, s. 11).

Administrator-General.

Formerly, administrators in this country to the estates of persons dying abroad were allowed a commission of 5 per cent upon receipts *or* payments. This practice, however, was abolished in the Presidency of Bengal by Act VII of 1849, and in the Presidencies of Madras and Bombay by Act II of 1850; and now it is provided by the Administrator-Generals' Act[1] that "no person other than the Administrator-General acting officially shall receive or retain any commission or agency charges for anything done as executor or administrator under any probate or letters of administration, or letters *ad colligenda bona* which have been granted by the Supreme Court or High Court at Fort William in Bengal since the passing of Act No. VII of 1849, or by either of the Supreme or High Courts at Madras and Bombay since the passing of Act II of 1850, or which shall have been or shall be granted by any Court of competent jurisdiction within the meaning of ss. 187 and 190 of the Indian Succession Act." It is illegal, therefore, for any person other than the Administrator-General to charge commission for administering estates.[2] Section 52 of the Act provides, that the Administrator-General of Bengal shall be entitled to commission at the rate of 3 per cent, and the Administrators-General of Madras and Bombay respectively at the rate of 5 per cent upon the value of the assets which they respectively collect and distribute in due course of administration. The section does not apply to the property of officers and soldiers dying on service (s. 53). And s. 55 authorizes the Governor-General in Council to alter the rates of commission.

Trustee may not make a profit from his office.

It is an invariable rule that a trustee shall gain no benefit to himself by any act done by him as trustee, but that all his acts shall be for the benefit of his *cestui que trust.* This rule was established in order to keep trustees in the line of their duty.[3] So that wherever a trustee, or one standing in the relation of a trustee, violates his duty, and deals with the trust-estate for his own behoof, he must account to the *cestui que trust* for all the gain which he has made; as where a profit is made by employing trust-

[1] II of 1874, s. 50. [2] *In re* Cowie, I. L. R., 6 Calc., 77.
[3] O'Herlihy *v.* Hedges, 1 Sch. and Lef., 126, *per* Lord Redesdale.

money in buying and selling land, or stock, or in a commercial adventure, in all these cases the profit made by the transaction will not be allowed to go to the trustee, who has so applied the money, but to the *cestui que trust*, whose money has been so applied. In like manner, where a trustee or executor has used the fund committed to his care in stock speculations, though the loss, if any, must fall upon himself, yet for every farthing of profit he may make he will be accountable to the trust-estate. So, if he lay out the trust-money in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person, from which he is to derive a certain stipulated profit, he must account for the profits received by the adventure or from the concern.[1] And the rule applies to a mortgagee, who is not allowed to have more out of the mortgage-fund than his principal and interest.[2] It does not matter that the original trust-fund has not been impaired; the rule is based on the principle that a trustee shall not be allowed to do an act which brings his private interests and his duty to the trust in conflict.[3]

SECRETARIAT

Employing trust-funds in trade.

So, if a trustee or executor employs trust-funds in his own business, he must account to his *cestuis que trustent* for all profits made by so employing the trust-funds, and he will be liable for all losses.[4] "If," said Lord Cairns,[5] "a partner in a trading firm dies, and if he constitutes one or more of his copartners his executors, and if there is nothing special in the contract of copartnership, and if the assets of the testator are not withdrawn from the copartnership, but are left in it, and no liquidation is arrived at, no settlement of accounts come to, it is a trite and familiar rule in the Court of Chancery to hold, that the estate of that testator is, to all intents and purposes, entitled to the benefit of a share in the profits which are made in the trade after his death. And if this should happen, which is the principle of another class of cases, that the partnership

[1] Docker *v.* Somes, 2 M. and K., 664; Burgess *v.* Wheate, 1 Eden, 177; Middleton *v.* Spicer, 1 Bro. C. C., 201; *Ex parte* Andrews, 2 Rose, 412.

[2] Gubbins *v.* Creed, 2 Sch. and Lef., 218; see also Baldwin *v.* Bannister, 3 P. Wms., 251 (A); Dobson *v.* Land, 8 Hare, 220; Arnold *v.* Garner, 2 Ph., 231; Matthison *v.* Clarke, 3 Drew., 3.

[3] Hamilton *v.* Wright, 9 C. and F., 111.

[4] Docker *v.* Somes, 2 M. and K., 655; Wedderburn *v.* Wedderburn, 2 Keen, 722; Willett *v.* Blandford, 1 Hare, 253; Parker *v.* Bloxam, 20 Beav., 295; Cummins *v.* Cummins, 8 Ir. Eq., 723; Townend *v.* Townend, 1 Giff., 201.

[5] Vyse *v.* Foster L. R., 7 H. L., 329.

LECTURE IX.

articles have given the surviving partners an option to take to the interest of the testator on certain terms, at a certain price to be fixed by arrangement after the death of the testator, an option or power which may be accepted or refused, but which, if accepted and acted upon, must be acted upon according to the terms on which it is given—if, I say in a case of that kind, the surviving partners or one or more of them, being also executors of the deceased partner, are found not to have pursued exactly the terms of the power or option which has been given, there again the power or option to become purchasers of the interest of the testator after his death falls to the ground, and the partnership remains an unliquidated partnership, to a due share of the profits of which the estate of the testator will continue to be entitled until liquidation actually takes place. It is a rule without exception, that to authorize executors to carry on a trade with the property of their testator, there must be the most distinct and positive authority and direction given by the will itself for that purpose."[1]

Compounding debts or mortgages and purchasing

Upon these principles, if executors or trustees compound debts or mortgages, and buy them in for less than is due thereon, they will not be allowed to take the benefit of the purchase themselves; but other creditors and legatees will have the advantage of it, and for want of them, the benefit will go to the party entitled to the surplus; whereas if one who acts for himself, and is not in the circumstances of an executor or trustee, buys in a mortgage or debt for less than is due, or for less than it is worth, he will be allowed all that is due thereon.[2]

Purchase for benefit of *cestui que trust.*

But the rule that a trustee cannot purchase applies only where the trustee purchases for his own benefit. If he buys for the benefit of his *cestuis que trustent*, and they repudiate the transaction, and it subsequently turns out to be profitable, they cannot claim the benefit.[3]

Cestui que trust cannot give to trustee.

So strongly do Courts of Equity object to allowing a trustee to make any profit out of the trust-estate, that it has been held that a *cestui que trust* cannot give a benefit to his trustee.[4]

[1] Kirkman *v.* Booth, 11 Beav., 273.

[2] Robinson *v.* Pett, 3 P. Wms., 251 (A); *Anon.*, 1 Salk., 155; Darcy *v.* Hall, 1 Vern, 49; *Ex parte* Lacey, 6 Ves., 625; Fosbrooke *v.* Balguy, 1 M. & K., 226; Pooley *v.* Quilter, 2 DeG. & J., 327; Mackintosh *v.* Nobinmoney Dossee, 2 Ind. Jur., 162.

[3] Barwell *v.* Barwell, 34 Beav., 371.

[4] Vaughton *v.* Noble, 30 Beav., 39.

The rule that a trustee shall not be allowed to make a profit out of the trust-property, applies not only to cases where there is an express trust, and a certain fund is in the hands of trustees to be applied in a particular manner for the benefit of particular persons, but to all cases in which persons stand in a fiduciary relation to each other.

Rule applies to all fiduciary relations.

Thus, partners are bound to use the joint property for the benefit of all the owners, and one partner will not be allowed to make profit to himself out of the partnership transactions.[1] And if, after a partnership has terminated, whatever the cause of the termination may be, one partner carries on the partnership business and retains the share of the outgoing partner in the business, he must account for the profits which he makes by the money he has retained,[2] subject to "just allowances" for special skill, industry, or other matters, by which profit is gained apart from the use of capital.[3]

Partners.

In *Knox* v. *Gye*[4] a difference of opinion arose as to whether a surviving partner was a trustee for the representatives of a deceased partner. Lord Westbury said: "There is nothing fiduciary between the surviving partner and the dead partner's representatives, except that they may respectively sue each other in equity. There are certain legal rights and duties which attach to them; but it is a mistake to apply the word 'trust' to the legal relation which is thereby created." Lord Hatherley, on the other hand, said: "I thought it was an elementary principle of law that the partnership, which at law survives to the surviving partner, which carries to him at law the whole interest in the partnership assets, which, treating him as a joint tenant, vests the whole of the partnership estates in him, was always subject to the doctrine of a Court of Equity; that, in equity, the interest of a partner in the partnership is that of a tenancy in common as between the two partners: so that the executors of a deceased partner have an interest in those assets which the surviving

[1] Crawshay *v.* Collins, 15 Ves., 218; Bentley *v.* Craven, 18 Beav., 75; Parsons *v.* Hayward, 31 Beav., 199.

[2] Crawshay *v.* Collins, 15 Ves., 218; Brown *v.* De Tastet, Jac., 284; Wedderburn *v.* Wedderburn, 2 Keen, 722; Flockton *v.* Bunning, L. R., 8 Ch., 323 *n.* (6); Ramlal Thakursidas *v.* Lakhmichand Muniram, 1 Bom., Apx., lx.

[3] Brown *v.* De Tastet, Jac., 284; Willett *v.* Blandford, 1 Hare, 253; Docker *v.* Somes, 2 M. & K., 662.

[4] L. R., 5 H. L., 656.

LECTURE IX.

partner alone can get at, and that the surviving partner alone having a legal interest in the property, there arises, necessarily, a right, as between the executors of the deceased partner and him, to insist upon his holding those assets, which he so collects, according to the partnership interest, or subject to the share which the executors of the deceased partner, in right of their testator, are entitled to claim, so much so, that it is trite law that a surviving partner cannot make use of the assets of a deceased partner without being accountable for the use he has made of them. The executors of the deceased partner have a right to a sale of every portion of the partnership property. So completely are they held to be in a fiduciary position, so completely are the assets, including the plant or houses, the machinery or stock-in-trade, or whatever the description of property may be that comes into the hands of the surviving partner by right of his survivorship at law, and which are all vested in that surviving partner by right of his survivorship at law, held to be property in all of which, whether they are chattels of the partnership, or estates of the partnership, the executors of a deceased partner have an interest commensurate with the extent of the share of their testator. They have a right, therefore, to have that property so disposed of, that it may be applied under the direction of a Court of Equity according to the equitable rights between the partners."

Purchasing share of deceased partner.

There is nothing, however, which prevents a surviving partner from purchasing the share of a deceased partner from his representatives.[1]

Instances of rule.

The principle that a person holding a fiduciary position shall not obtain for himself a benefit from the trust-funds, extends to an agent becoming a trustee or executor;[2] guardians[3] (who are trustees of such property only as comes to their hands);[4] directors of companies, who cannot be allowed to make a profit out of work done by them for the company beyond their regular salary as directors,[5] unless

[1] Chambers *v.* Howell, 11 Beav., 6. As to the effect of an heir or devisee purchasing an incumbrance, see Lewin, 7th Edn., 256.

[2] Sheriff *v.* Axe, 4 Russ., 38; Morret *v.* Paske, 2 Atk., 54.

[3] Powell *v.* Glover, 3 P. Wms., 251 (*n*).

[4] Sleeman *v.* Wilson. L. R, 13 Eq., 41.

[5] Great Luxembourg Railway Company *v.* Magnay, 25 Beav., 586; Imperial Merchantile Credit Association *v.* Coleman, L. R., 6 Ch., 558; L. R., 6 H. L., 189; Parker *v.* M'Kenna, L. R., 10 Ch., 96; *In re* Imperial Land Co. of Marseilles, *Ex parte* Larking, L. R., 4 Ch. Div., 566.

the articles of association of the company expressly stipulate that they may do work for the company in their private capacity, and receive remuneration for the work so done.[1] And the rule applies to the officers of companies,[2] or promoters,[3] inspectors under creditor's deeds;[4] and it has been held to extend to the mayor of a corporation.[5] So a broker,[6] or auctioneer,[7] who assumes a fiduciary position, cannot charge commission for selling the trust-property unless expressly authorized to do so by the will.[8] In *Morison* v. *Morison*[9] an executor and trustee was appointed a consignee, with the usual profits, by the Court, the appointment being for the benefit of the estate. And trustees who are bankers cannot advance money to the trust at compound interest, although such a course of procedure may be usual; but can only charge simple interest.[10] A trustee will not, as a general rule, be appointed a receiver, the principle being that the person who accepts the office of trustee engages to do the whole duty of a receiver without emolument. And if a receiver is appointed, the Court looks to the trustee to examine with an adverse eye, to see that the receiver does his duty. The consequence is, that a trustee is seldom appointed receiver, and only when he engages to act without emoluments.[11]

Trustee retiring for a consideration.

Where a testator appointed two trustees as executors of his will, but by a codicil he excluded them and appointed two other persons, one of whom retired in consideration of a sum of money paid to him by one of the excluded trustees, and executed a deed appointing the excluded trustee to act as trustee in his room, the Court directed the new trustee to be removed and the deed to be cancelled, declared the conveyance to be void, and directed the purchase-money to form part of the assets.[12]

[1] Imperial Merchantile Credit Association *v.* Coleman, L. R., 6 Ch., 558; see *In re* The Port Canning Co., 6 B. L. R., 278.

[2] *In re* Morvah Mining Co., McKay's Case, L R., 2 Ch. Div., 1.

[3] New Sombrero Phosphate Co. *v.* Erlanger, L. R., 5 Ch. Div., 73; Bagnall *v.* Carlton, L R., 6 Ch. Div., 371.

[4] Chaplin *v.* Young (No. 2), 33 Beav., 414.

[5] Bowes *v.* The City of Toronto, 11 Moore's P. C. C., 463.

[6] Arnold *v.* Garner, 2 Phillips, 231.

[7] Matthison *v.* Clarke, 3 Drew., 3; Kirkman *v.* Booth, 11 Beav., 273.

[8] Douglas *v.* Archbutt, 2 DeG. and J., 148.

[9] 4 M. and Cr., 215. [10] Crosskill *v.* Bower, 32 Beav., 86.

[11] —— *v.* Jolland, 8 Ves., 72; Sykes *v.* Hastings, 11 Ves., 363; Sutton *v.* Jones, 15 Ves., 584.

[12] Sugden *v.* Crossland, 3 Sm. and G., 192.

LECTURE IX.

Extent of liability.

If the person using the trust-fund is not a trustee, he will be liable to the *cestui que trust* only for the principal and interest, but not for the profits; as for example, where a trustee lends the trust-fund to a trader to be used in his business, in this case there is no fiduciary relationship between the trader and the *cestui que trust*, and the trader is only liable as on an ordinary loan.[1]

Failure of heirs of *cestui que trust.*

If property is vested in a trustee upon trust for a certain person and his heirs, and such person dies without heirs and intestate, the trustee will then be entitled to hold the property for his own purposes. The author of the trust has parted with his interest, and there is no person claiming through the *cestui que trust* who has any right of suit against the trustee. Under these circumstances, the trustee can retain the property, not from any positive right in himself, but because there is no person entitled to oust him from possession.[2]

Failure of next-of-kin.

If a *cestui que trust* of chattels, whether real or personal, dies intestate without leaving any next-of-kin, the beneficial interest will not in this case remain with the trustee, but, like all other *bona vacantia*, will vest in the Crown by the prerogative.[3]

Trustee for sale cannot purchase.

There is another class of cases in which the principle, that a trustee shall not be allowed to do any act which brings his interest and his duty as a trustee in conflict, is applied,—namely, those cases where a trustee for the sale of trust-property himself becomes the purchaser. These cases again may be divided into two classes: (1) where the trustee attempts to purchase directly from himself, (2) where the purchase is effected by contract or agreement between the trustee and his *cestui que trust*.

Trustee purchasing from himself.

In the first class of cases, the rule is absolute that a trustee shall not buy from himself. The principle is, that as the trustee is bound by his duty to acquire all the knowledge possible to enable him to sell to the utmost advantage for the *cestui que trust*, the question what knowledge he has obtained, and whether he has fairly

[1] Stroud *v.* Gwyer, 28 Beav., 130; Townend *v.* Townend, 1 Giff., 210; Simpson *v.* Chapman, 4 DeG. M. and G., 154; Macdonald *v.* Richardson, 1 Giff., 81.

[2] Burgess *v.* Wheate, 1 Eden, 177; Taylor *v.* Haygarth, 14 Sim., 8: see Lewin, 7th Edn., 259.

[3] See Lewin, 7th Edn., 262.

given the benefit of that knowledge to the *cestui que trust*, which he acquires at the expense of the *cestui que trust*, no Court can discuss with competent sufficiency or safety to the parties;[1] the same person cannot be both buyer and seller; "he who undertakes to act for another in any matter, shall not in the same matter act for himself."[2]

The reason why a trustee is not permitted to purchase is, because the Court will not permit a man to have an interest adverse and inconsistent with the duty which he owes to another; and as a trustee for sale is bound to get the best price for property to be sold that he can, the Court will not permit him to have an interest of his own adverse to the discharge of his duty to his principal. If he is the purchaser, he is interested in getting the property at the lowest price he can; but if he is acting *bonâ fide* for the owner of the property, his duty is to sell at the best price he can obtain; and the Court will not permit a party to place himself in a situation in which his interest conflicts with his duty; for taking mankind at large, it is not very safe to allow a man to put his private interest in conflict with the duty which he owes to another.[3]

That price fair immaterial.

It may be that the price given is fair, and that the trustee has not gained any advantage by the transaction, the purchase is nevertheless invalid.[4] "The rule I take to be this," said Lord Eldon,[5] "not that a trustee cannot buy from his *cestui que trust*, but that he shall not buy from himself." "Without any consideration of fraud, or looking beyond the relation of the parties, that contract is void," said Lord Erskine,[6] speaking of the case of a trustee selling to himself.[7] If the trustee has made a profit on the transaction, as by a resale, he will have to account for such profit.[8]

So nature of property

The nature of the property is immaterial; the rule applies whether the property is moveable or immoveable.[9]

[1] *Ex parte* James, 8 Ves., 348.

[2] Whichcote *v.* Lawrence, 3 Ves., 750, *per* Lord Loughborough, L. C.; *Ex parte* Lacey, 6 Ves., 626; *Re* Bloye's Trust, 1 Mac. and G., 495.

[3] *In re* Bloye's Trust, 1 Mac. and G., 495, *per* Lord Cranworth; and see *Ex parte* Bennett, 10 Ves., 394.

[4] *Ex parte* James, 8 Ves., 348; *Ex parte* Bennett, 10 Ves., 393; *Ex parte* Lacey, 6 Ves., 627

[5] *Ex parte* Lacey, 6 Ves., 627.

[6] Morse *v.* Royal, 12 Ves., 372.

[7] And see Randall *v.* Errington, 10 Ves., 425.

[8] Fox *v.* Mackreth, 2 Bro. C. C., 400; Whichcote *v.* Lawrence, 3 Ves., 740.

[9] Hall *v.* Hallett, 1 Cox, 134; Crowe *v.* Ballard, 2 Cox, 253; Killick *v.* Flexney, 4 Bro. C. C., 160; Watson *v.* Toone, 6 Mad., 153.

LECTURE IX.

Or mode of purchase.

So it is immaterial that the purchase is made by the trustee at a public sale by auction.[1] "If persons who are trustees to sell an estate are there professedly as bidders to buy, that is a discouragement to others to bid. The persons present seeing the seller there to bid for the estate to or above its value, do not like to enter into that competition."[2] And it makes no difference that the purchase is in the name of another person as the trustee's agent.[3] And the rule applies to the case of one of several trustees buying for himself.[4]

Purchase by trustee for another.

So a trustee may not purchase for another person. "One of the reasons for setting aside such transactions," said Sir Barnes Peacock,[5] "is, that the purchaser is presumed from his position to have better means than the vendor has of ascertaining the value of the property purchased. Well, then, if a person knowing that another holds a fiduciary position and has a better knowledge of the value than the vendor, employs that person to purchase for him, and the trustee purchases secretly in his own name for the benefit of that other, it appears to their Lordships that the sale is equally invalid against the person for whose benefit it is purchased by the trustee as it would be against the trustee himself."

A mortgagee, who sells under a power of sale, cannot, except with the leave of the Court, be allowed to purchase the mortgaged estate.[6]

Trustee who has never acted.

A person who has been named as a trustee for sale in an instrument, but who has never accepted or acted in the trust, is not a trustee; and consequently he will not be disabled from purchasing the trust-property.[7] So a merely nominal trustee may purchase. In this case there is no conflict between duty and interest on the part of the

[1] Campbell *v.* Walker, 5 Ves, 678: 13 Ves., 601; Lister *v.* Lister, 6 Ves., 631; Sanderson *v.* Walker, 13 Ves., 601; Downes *v.* Grazebrook, 3 Mer., 200

[2] *Ex parte* Lacey, 6 Ves., 629, *per* Lord Eldon.

[3] Whelpdale *v.* Cookson, 1 Ves., 9; Campbell *v.* Walker, 5 Ves., 678; 13 Ves., 601; Downes *v.* Grazebrook, 3 Mer., 200; Randall *v.* Errington, 10 Ves., 423.

[4] Whichcote *v.* Lawrence, 3 Ves., 740; Morse *v.* Royal, 12 Ves., 374.

[5] Dhonender Chunder Mookerjee *v.* Mutty Lall Mookerjee, 14 B. L. R., 283; (S. C.) 23 W R., 6.

[6] Downes *v.* Grazebrook, 3 Mer., 200; S. M. Kamini Debi *v.* Ramlochan Sirkar, 5 B. L. R., 458.

[7] Chambers *v.* Waters, 3 Sim., 42; Stacey *v.* Elph, 1 M. and K., 195.

trustee, and there is no object in preventing him from becoming a purchaser.[1]

When *cestui que trust* may set aside sale.

However fair, open, and honest the transaction may be, although the trustee may have given as much for the property as it is reasonably worth, and as much as any one else would give; and although no fraud, mismanagement, or negligence appears to the Court, yet the sale is always liable to be set aside at the suit of the *cestui que trust*.[2] It is, as we have seen, immaterial that the trustee has not made any advantage. "If the connection (between the trustee and *cestui que trust*) does not satisfactorily appear to have been dissolved," said Lord Eldon,[3] "it is in the choice of the *cestuis que trustent*, whether they will take back the property or not. It is founded upon this, that though you may see in a particular case that he has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the Court—by which I mean in the power of the parties—in ninety-nine cases out of an hundred, whether he has made advantage or not. Suppose a trustee buys any estate, and by the knowledge acquired in that character discovers a valuable coal-mine under it; and locking that up in his own breast, enters into a contract with the *cestui que trust*, if he chooses, how can the Court try that against that denial? The probability is, that a trustee who has once conceived such a purpose will never disclose it; and the *cestui que trust* will be effectually defrauded."[4]

"If," said Lord Eldon in another case,[5] "a trustee can buy in an honest case, he may in a case having that appearance, but which, from the infirmity of human testimony, may be grossly otherwise."

Trustee may not buy for another.

The duties imposed upon trustees prevent their buying for themselves, and it follows from the general rule that they cannot be permitted to buy for a third person; for the Court can, with as little effect, examine whether that was done by making an undue use of the information received in the course of their duty in the one case as in the other.[6]

[1] See Lewin on Trusts, 7th Edn., 439.

[2] Campbell *v.* Walker, 5 Ves., 678; Gibson *v.* Jeyes, 6 Ves., 266; *Ex parte* Lacey, *ib.*, 625; Randall *v.* Errington, 10 Ves., 423; Downes *v.* Grazebrook, 3 Mer., 209.

[3] *Ex parte* Lacey, 6 Ves., 627.

[4] And see *Ex parte* James, 8 Ves., 337.

[5] *Ex parte* Bennett, 10 Ves., 385.

[6] Coles *v.* Trecothick, 9 Ves., 248; *Ex parte* Bennett, 10 Ves., 400.

LECTURE IX.

Agent of trustee may not purchase.

The agent of a trustee for the sale of an estate employed for the sale of the estate cannot purchase;[1] the reasons which disqualify his principal from purchasing apply equally to him. Practically, he is the person who conducts the sale, and it is on his exertions that the result of the sale depends; and, therefore, to say that the principal is incapacitated, but that the agent is not, would be an absurd distinction, the reason remaining the same and being as applicable to the one as to the other.[2]

An agent not for sale, but for management only, and a receiver appointed by the Court, stand in a confidential relation, and cannot purchase without putting themselves at arm's length and a full disclosure of their knowledge.[3]

Trustee taking lease.

The principle that we are now considering applies to the case of a trustee taking a lease of the trust-property to himself. His duty and his interest may conflict, and therefore, if the lease is advantageous to him, for that is equivalent to a purchase, he must account to the *cestui que trust* for the profits, and must give up the lease; if it is disadvantageous to him, he will be held to his bargain.[4]

Time within which sale must be set aside.

Although the Limitation Act (Act XV of 1877, s. 10) provides, that no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property, shall be barred by any length of time; yet a *cestui que trust* who seeks to set aside a purchase must do so within a reasonable time,[5] otherwise if he allows the trustee to remain in possession for a length of time as absolute owner, his right to relief may be affected by his acquiescence.[6] What period of time would operate as an absolute bar to relief cannot be laid down exactly. Relief has been refused after an acquiescence of seventeen years.[7]

[1] Whitcomb *v.* Minchin, 5 Mad., 91.

[2] *Re* Bloye's Trust, 1 Mac. & G., 495.

[3] Lewin on Trusts, 7th Edn., 440, citing King *v.* Anderson, 8 I. R., Eq., 147, 625; Alven *v.* Bond, 1 Flan. & Kelly, 196; White *v.* Tommy, 1 Flan. & Kelly, 224.

[4] *Ex parte* Hughes, 6 Ves., 617; Parker *v.* Brooke, 9 Ves., 583; The Attorney-General *v.* The Earl of Clarendon, 17 Ves., 500.

[5] Campbell *v.* Walker, 5 Ves., 680; Chalmer *v.* Bradley, 1 J. & W., 59; Webb *v.* Rorke, 2 Sch. & Lef., 672.

[6] *Ex parte* James, 8 Ves., 351; Randall *v.* Errington, 10 Ves., 427; Webb *v.* Rorke, 2 Sch. & Lef., 672; Parkes *v.* White, 11 Ves., 226.

[7] Baker *v.* Baker, 18 Beav., 398.

And in *Oliver* v. *Court*,[1] Richards, C. B., seemed to think that twelve years would be sufficient. Much of course would depend upon the nature of the transaction.[2]

Sales have been set aside after acquiescence for ten[3] and eleven years.[4] But if there has been disguise and concealment on the part of the trustee, the purchase may be set aside even after an interval of twenty years;[5] and there can, of course, be no acquiescence on the part of persons who are not competent to contract. Nor can there be acquiescence if the *cestui que trust* was ignorant of the fact that the trustee was the purchaser.[6]

The rule as to acquiescence will not apply with the same force if the *cestui que trust* has been hindered from taking proceedings by poverty,[7] or in the case of creditors.[8] But they may be barred by gross laches, such as delay for thirty-three years.[9]

Confirmation.

If the *cestui que trust* is a person competent to contract, he may confirm the sale, and will be estopped from subsequently disputing it,[10] unless the confirmation has been obtained fraudulently, or he was ignorant of the facts.[11]

The confirmation must not be contemporaneous with the conveyance,[12] and it must be the solemn and deliberate act of the *cestui que trust*.[13]

Purchase from *cestui que trust*.

Although a trustee for sale cannot, so long as he remains a trustee, purchase from himself, yet he may, under certain

[1] 8 Price, 167.

[2] See also Morse *v* Royal, 12 Ves., 374; Price *v*. Byrn, cited 5 Ves., 681; Barwell *v*. Barwell, 34 Beav., 371; Champion *v*. Rigby, 1 R. & M, 539; Roberts *v*. Tunstall, 4 Hare, 257.

[3] Hall *v*. Noyes, cited in 3 Ves., 749.

[4] Murphy *v*. O'Shea, 2 J. & Lat., 422.

[5] Watson *v*. Toone, 6 Madd., 153.

[6] Randall *v*. Errington, 10 Ves., 423; Chalmer *v*. Bradley, 1 J. & W., 51.

[7] Roberts *v*. Tunstall, 4 Hare, 267.

[8] Whichcote *v*. Lawrence, 3 Ves., 740; *Ex parte* Smith, 1 D. & C., 267; *Anon.*, cited in 6 Ves., 632; Kidney *v*. Cussmaker, 12 Ves., 158; York Buildings Co. *v*. Mackenzie, 8 Bro. P. C., 42.

[9] Heroy *v*. Dinwoody, 2 Ves. Jr., 87; Scott *v*. Nesbitt, 14 Ves., 446.

[10] Morse *v*. Royal, 12 Ves., 355; Clarke *v*. Swaile, 2 Eden, 134; Chesterfield *v*. Janssen, 2 Ves., 125; Scott *v*. Davis, 4 M. & C., 92.

[11] Murray *v*. Palmer, 2 Sch. & Lef., 486; Morse *v*. Royal, 12 Ves., 373; Adams *v*. Clifton, 1 Russ., 297; Cockrell *v*. Cholmeley, 1 R. & M., 425; Chalmer *v*. Bradley, 1 Jac. & W., 51; Dunbar *v*. Tredennick, 2 B. & B., 317.

[12] Wood *v*. Downes, 18 Ves., 128; Morse *v*. Royal, 12 Ves., 373; Scott *v*. Davis, 4 M. & C., 91; Roberts *v*. Tunstall, 4 Hare, 267.

[13] Carpenter *v*. Heriot, 1 Eden, 338; Montmorency *v*. Devereux, 7 C. & F., 188.

LECTURE IX.

circumstances, purchase from his *cestui que trust*.[1] "If," said Lord Eldon,[2] "a trustee will so deal with his *cestui que trust* that the amount of the transaction shakes off the obligation that attaches upon him as trustee, then he may buy." In *Coles* v. *Trecothick*[3] the same learned Judge said: "Upon the question as to a purchase by a trustee from the *cestui que trust*, I agree the *cestui que trust* may deal with his trustee so, that the trustee may become the purchaser of the estate. But, though permitted, it is a transaction of great delicacy, and which the Court will watch with the utmost diligence; so much, that it is very hazardous for a trustee to engage in such a transaction . . . . A trustee may buy from the *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, proving that the *cestui que trust* intended the trustee should buy, and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. I admit it is a difficult case to make out, wherever it is contended, that the exception prevails."[4]

Fiduciary relation dissolved.

If the relation of trustee and *cestui que trust* has been in some way dissolved, or if not, the parties are so much at arm's length that they agree to take the character of purchaser and vendor,[5]—if the *cestui que trust* is well advised of what his rights are,[6] and it is distinctly and fully understood by him that he is selling to the trustee, and the trustee takes no advantage of his situation to produce a beneficial bargain to himself,[7] the trustee may purchase from his *cestui que trust*, for then he purchases not indeed from himself as trustee, but under a specific contract with his *cestui que trust*.[8] The consequence is, that until the trustee has by contract done what all the cases admit he may do,—that is to say, effectually shaken off the character of trustee, and put himself in circumstances in which he shall be no

[1] Ayliffe *v.* Murray, 2 Atk., 59; Whichcote *v.* Lawrence, 3 Ves., 750; Gibson *v* Jeyes, 6 Ves., 277.
[2] *Ex parte* Lacey, 6 Ves., 626.
[3] 9 Ves, 234.
[4] And see Randall *v.* Errington, 10 Ves., 426; Downes *v.* Grazebrook, 3 Mer., 208; Morse *v.* Royal, 12 Ves., 373.
[5] Gibson *v* Jeyes, 6 Ves, 277.
[6] Spring *v.* Pride, 4 DeG. J. and S., 405.
[7] Randall *v.* Errington, 10 Ves., 427.
[8] Downes *v.* Grazebrook, 3 Mer., 208.

longer the person entrusted to sell, he shall not buy for himself.[1]

Burden of proof.

The burden of proof to show the *bona fides* of the transaction throughout, that the utmost price that could have been produced was obtained, and that the *cestui que trust* has not in any way been defrauded, lies upon the trustee.[2]

A trustee cannot be allowed to act up to the time of sale, to get all the information that may be useful to him, and then to discharge himself from the character of trustee and buy for himself. He must at the time of purchase have fully shaken off the character of trustee by the consent of the *cestui que trust* freely given, after full information and after the right to purchase has been bargained for.[3]

Where the *cestui que trust* has taken upon himself the conduct of all the preliminary proceedings requisite for the sale, such as the surveys, the mode and conditions of sale, the plans, the choice of the auctioneer; and has thus acquired a perfect knowledge of the value of the property, and the trustee has not been in a situation to acquire any exclusive information respecting the property, and a contract has then been made for sale by the *cestui que trust* to the trustee, the Court will deal with the contract as if made between two indifferent persons putting each other at arm's length, and will give effect to the sale, though made for an inadequate price.[4]

So the purchase has been supported where the *cestui que trust* proposed and pressed it upon the trustee.[5]

And where the trustee had exerted himself considerably to sell the trust-estate, but had not been able to meet with a purchaser, and subsequently agreed to purchase the premises for himself, with the consent and approval of the *cestui que trust*, Lord Northington refused to set the transaction aside, though he said that he did not like the circumstance of a trustee dealing with his *cestui que trust*.[6]

The solicitor of the *cestui que trust* cannot, in the absence of express authority from his client, enter into a contract

[1] *Ex parte* Bennett, 10 Ves., 394.
[2] Denton *v.* Donner, 23 Beav., 290; Luff *v.* Lord, 34 Beav., 226.
[3] *Ex parte* James, 8 Ves., 353; Spring *v.* Pride, 4 DeG. J. and S., 395.
[4] Coles *v.* Trecothick, 9 Ves., 248.
[5] Morse *v.* Royal, 12 Ves., 355.
[6] Clarke *v.* Swaile, 2 Eden, 134.

LECTURE IX.

with the trustee for the purchase by the trustee of the trust-property.[1]

Purchase by creditors.

Where the *cestuis que trustent* are creditors of an insolvent estate, the trustee can only purchase with the consent of all the creditors. In *Whelpdale* v. *Cookson*,[2] Lord Hardwicke confirmed the sale in case the majority of the creditors interested should not dissent. Lord Eldon, however, in *Ex parte Lacey*,[3] differed from Lord Hardwicke, saying "I doubt the authority of that case; for if the trustee is a trustee for all the creditors, he is a trustee for them all in the article of selling to others; and if the jealousy of the Court arises from the difficulty of a *cestui que trust* duly informing himself what is most or least for his advantage, I have considerable doubt whether the majority in that article can bind the minority."

Assignee.

Leave has been given to assignees to purchase upon the condition that the consent of the creditors at a meeting called for the purpose shall have been first obtained.[4]

Leave to bid.

The Court will not, where the *cestuis que trustent* are *sui juris*, give the trustee leave to bid at a sale by auction. In the case of infants, as we shall see presently, the rule is different. It is for the *cestui que trust*, the person interested, to decide whether he will sell to the trustee, and not a matter for the Court.[5] The reason why a trustee is not allowed to bid is, because he must have acquired much information, and the Court could feel no security that he would do his duty and communicate this information so as to raise the price if he had a prospect of becoming a purchaser. But if the Court is satisfied that no purchaser, at an adequate price, can be found, then the trustee may be allowed to make proposals and to become the purchaser.[6]

Purchase from infants.

The *cestuis que trustent* must be in such a position that they can act for themselves, and can effectually contract with the trustee. A purchase, therefore, by a trustee from infant *cestuis que trustent* will be void, as the *cestuis que trustent* are persons incapable of entering into a binding contract.[7] It may be that the trustee is willing to give

[1] Downes *v.* Grazebrook, 3 Mer., 208.
[2] Cited in Campbell *v.* Walker, 5 Ves., 682.
[3] 6 Ves., 628.
[4] *Ex parte* Bage, 4 Madd., 459; *Anon.*, 2 Russ., 350.
[5] *Ex parte* James, 8 Ves., 352.
[6] Tennant *v.* Trenchard, L. R., 4 Ch., 547.
[7] Campbell *v.* Walker, 5 Ves., 682; Sanderson *v.* Walker, 13 Ves., 601.

more than any one else for the property; and in such a case the only way by which he can safely purchase is to institute a suit, and apply to the Court by motion to let him be the purchaser, saying that so much is bid and that he will give more. The Court will examine into the circumstances,—ask who had the conduct of the transaction,—whether there is any reason to suppose the premises could be sold better; and upon the result of that inquiry will let another person prepare the particulars of sale, and let the trustee bid.[1]

Legal representatives.

An executor or administrator cannot be permitted, either immediately or by means of a trustee, to be the purchaser of any parts of the assets of his testator or intestate, but will be considered as a trustee for the persons interested, and must account to them for the utmost extent of the profit made by him.[2] And the general rule that a trustee shall not purchase trust-property applies to an executor *de son tort*,[3] or an agent,[4] and to any persons who may stand in a fiduciary position.

Mortgagee.

But the rule does not extend to a purchase by a mortgagee from his mortgagor, for the circumstance that two parties stand to each other in the relation of trustee and *cestui que trust* does not affect any dealing between them unconnected with the subject of the trust.[5] Nor is there any principle in equity that a surviving partner cannot purchase the share of a deceased partner from his representatives.[6] And a creditor taking out execution is not precluded from becoming the purchaser of the property seized under it.[7]

Lending to trustees.

If the instrument creating the trust authorizes the trustees to invest on personal security, it is a breach of trust if the trustees lend to one of themselves. The author of the trust relies upon the united vigilance of all the trustees with respect to the solvency of the borrower, and the

[1] Campbell *v.* Walker, 5 Ves., 681; Farmer *v.* Dean, 32 Beav., 327.
[2] Hall *v.* Hallett, 1 Cox, 134; Killick *v.* Flexney, 1 Bro. C. C., 161; Watson *v.* Toone, 6 Mad., 153.
[3] Mulvany *v.* Dillon, 1 B. and B., 408.
[4] King *v.* Anderson, I. R., 8 Eq., 625; Murphy *v.* O'Shea, 2 J. and Lat., 422.
[5] Knight *v.* Majoribanks, 11 Beav., 322; 2 Mac. and G., 10.
[6] Chambers *v.* Howell, 11 Beav., 6.
[7] Stratford *v.* Twynam, Jac., 418.

LECTURE IX.

object is defeated by a loan to one of the trustees.[1] "And trustees having a power, with the consent of the tenant-for-life, to lend on personal security, cannot lend on personal security to the tenant-for-life himself. And when the Court has assumed the administration of the estate by the institution of a suit, it will not direct an investment on personal security, though there be a power to lay out on either personal or Government security, but will order all future investments to be made on Government security."[2]

[1] ——— *v.* Walker, 5 Russ.. 7; Stickney *v.* Sewell, 1 My. and Cr., 8; Westover *v.* Chapman, 1 Coll., 177.
[2] Lewin, 7th Edn., 291.

LECTURE X.

OF THE RIGHTS AND LIABILITIES OF THE *CESTUI QUE TRUST.*

Right of *cestui que trust* to rents and profits — Tidd *v.* Lister — Right to call for conveyance — Costs — Indemnity — Right of *cestui que trust* to have trust carried out — Right of *cestui que trust* to hold property absolutely — Separate use — Right of *cestui que trust* to inspection — Custody of title-deeds — Right of *cestui que trust* to alienate his interest — Cautions in assignments of equitable interest — Separate use — Method of conveyance — Assignee takes subject to all equities — Set-off — Mutual demands must be in respect of same rights — Notice to trustees — Mortgage — Description of property — What is sufficient notice — To whom notice to be given — Agents — Notice to one of several trustees — Notice before trust-fund received — Bankers — Trustee purchaser — Nonpayment — Mortgagee — Immoveable property — Stop-order — Right to execution of trust — Suit for execution of trust — Intention of author of trust carried out — Right to proper trustees — Suit for appointment of new trustees — Costs — Grounds for removal of trustee — Rules for selecting new trustees — *In re* Tempest — Right to compel trustee to do act of duty — Injunction — Wrongful purchase by trustee — Interest — Allowance for outlay — Reconveyance — Interest — Costs — Following trust-estate into hands of third persons — Volunteers — Purchasers for value — Purchase from guardian — Notice of trust — Purchaser for valuable consideration without notice — Purchaser without notice from purchaser with notice — Purchaser with notice from purchaser without — Fraud — Doubtful equity — Following converted trust-property — Proof of purchase with trust-money — Money, notes, or negotiable instruments — Trust-fund mixed with trustee's money — Pennell *v.* Deffell — *Re* Hallett's Estate — Lien — Limitation — Accrual of cause of action — Fraud — Purchase from manager of joint Hindu family — Position of shebait — Duty of purchaser — Terms on which sale set aside — Duty of manager — What is sufficient necessity — Sale to pay debts — Hunooman Persaud Panday's case — Purchaser under execution — Purchase from heir of Mahomedan debtor — Acquisition by trustee of trust-property wrongfully converted — Liability of executor or administrator to pay interest — Liability of trustee who leaves property uninvested — When trustee liable to pay interest — Trustee employing trust-funds in trade — Docker *v.* Somes — Apportioning profits — Compound interest — Trust-funds mixed with trustee's money — Partner trustee employing trust-funds in business — Election where trust-property to be sold or invested — Election by one *cestui que trust* to retain property unconverted — Notification of election — Liability of *cestui que trust* joining in breach of trust — Against whom interest of *cestui que trust* applied — Rights and liabilities of transferree from *cestui que trust.*

LECTURE X.

Right of *cestui que trust* to rents and profits.

IN the case of a passive trust, the *cestui que trust* has a right to take the rents and profits or income of the trust-property;[1] and where there is only one *cestui que trust*, he may compel the trustee to put him in possession of the estate.[2] The cause of action in such a case accrues upon refusal by the trustee to give up the property upon demand by the *cestui que trust*, and not from the date when the trustee enters into possession.[3] If trustees eject a *cestui que trust*, they will have to account, not only for rents which they receive, but for the whole of the rents which the tenants were bound to pay.[4] But if there are several *cestuis que trustent*, the Court will not, as a rule, take the property out of the hands of the trustees, or if it does do so, it will take care that the transfer shall be accompanied with such conditions and restrictions as the nature of the case may require in order to protect the interests of the *cestuis que trustent* who do not get possession. In *Tidd* v. *Lister*,[5] where successive estates were limited by will, it was argued that it was a matter of course in a Court of Equity to divest trustees of the management of the trust-property and to deliver possession of it to the *cestui que trust*. Sir John Leach, V. C., however, refused to remove the trustees from the management, saying, "My first impressions were strongly against the existence of any such rule. It is perfectly plain from the continuing nature of this trust, that the testator intended that the actual possession of the trust-property should remain with the trustees; and it did appear to me a singular proposition that if a testator, who gives in the first instance a beneficial interest for life only, thinks fit to place the direction of the property in other hands, which is the obvious means of securing the provident management of that property for the advantage of those who are to take in succession, that it should be a principle in a Court of Equity to disappoint that intention, and to deliver over the estate to the *cestui que trust* for life, unprotected against that bias which he must naturally have to prefer his own immediate interest to the fair rights of those who are to take in remainder . . . . There may be cases in which it

Tidd v. Lister.

[1] Smith v. Wheeler, 1 Mod., 17.

[2] Lewin, 7th Edn., 576; and see Brajnath Baisakh v. Matilal Baisakh, 3 B. L. R., O. J., 92.

[3] Rakhaldas Madak v. Madhusudun Madak, 3 B. L. R., A. C., 409.

[4] Kaye v. Powell, 1 Ves. Jr., 408. [5] 5 Madd., 429.

may be plain from the expressions in the will, that the testator did not intend that the property should remain under the personal management of the trustees. There may be cases in which it may be plain from the nature of the property that the testator could not mean to exclude the *cestui que trust* for life from the personal possession of the property, as in the case of a family residence. There may be very special cases in which this Court would deliver the possession of the property to the *cestui que trust* for life, although the testator's intention appeared to be that it should remain with the trustees, as where the personal occupation of the trust-property was beneficial to the *cestui que trust.* There the Court, taking means to secure the due protection of the property for the benefit of those in remainder, would in substance be performing the trust according to the intention of the testator."[1]

Right to call for conveyance.

And where a *cestui que trust* would be entitled to require the trustee to put him in possession of the trust-property, he may call upon the trustee to convey the property to such person as he may require.[2] Should the trustee refuse to convey, the *cestui que trust* may institute a suit to compel him to do so, and if it appears that there was no good ground for the refusal, the trustee will have to pay the costs of the suit,[3] as where a trustee has insisted upon enquiring into matters connected with a distinct trust,[4] or refuses to convey through obstinacy and caprice.[5] But a trustee will not be made to pay costs where he acts in good faith and under competent advice, though the fact that the trustee consulted counsel will not necessarily entitle him to his costs.[6] Nor will he be made to pay costs where information as to the existence of the trusts has been withheld from him,[7] or where he has refused to

Costs.

[1] See also Blake *v.* Bunbury, 1 Ves. Jr., 194; Jenkins *v.* Milford, 1 J. & W., 629; Baylies *v.* Baylies, 1 Coll., 537; Denton *v.* Denton, 7 Beav., 388; Pugh *v.* Vaughan, 12 Beav., 517.

[2] Lewin, 7th Edn., 585, citing Payne *v.* Barker, Sir G. Bridgman's Rep., 24.

[3] Jones *v.* Lewis, 1 Cox, 199; Thorby *v.* Yeats, 1 Y. & C. C. C., 438; Willis *v.* Hiscox, 4 M. & Cr., 202; Campbell *v.* Home, 1 Y. & C. C. C., 664; Hampshire *v.* Bradley, 2 Coll., 34; Penfold *v.* Bouch, 4 Hare, 272; Firmin *v.* Pulham, 2 DeG. & Sm., 99.

[4] Palairet *v.* Carew, 32 Beav., 564.

[5] Taylor *v.* Glanville, 3 Madd., 178.

[6] Devey *v.* Thornton, 9 Hare, 232; Angier *v.* Stannard, 3 My. & K., 566.

[7] Holford *v.* Phipps, 3 Beav., 434.

LECTURE X.

convey in pursuance of an opinion expressed by counsel that the concurrence of certain parties was necessary.[1] "I admit," said Lord Gifford,[2] "that it is only in a strong case that costs will be given against trustees: yet where they refuse without a reasonable motive, for their refusal to act without suit, they will be visited with costs." "Trustees," said Sir J. Leach, V.C.,[3] "are entitled to the protection and direction of the Court in the exercise of their trusts, and can never be called upon to pay costs, unless they refuse to act without suit merely from obstinacy and caprice. In the present case, I am of opinion that the suit has been rendered necessary by the caprice and pertinacity of the trustees; and considering the immense expense to which beneficiaries may be exposed, where a trustee who might have satisfied himself out of Court concerning the propriety of what he was called upon to do, as well as by coming into Court, refuses to act unless he is compelled by a decree, the defendant must pay the costs of the suit."

Indemnity.

If there is any real difficulty, the trustees are entitled to require an indemnity.[4]

A trustee is entitled to protect himself from liability. For instance, he may require that all necessary persons are made parties,[5] and he cannot be required to convey any other estate than that conveyed to him.[6] Nor can he be required to accept incorrect recitals.[7] Apparently, a trustee cannot be called upon from time to time to divest himself of different parcels of the trust-estate so as to involve himself as a party to conveyances to a number of different persons. He has a right to say, "If you mean to divest me of my trust, divest me of it altogether, and then make your conveyances as you think proper."[8] If the trustee has reasonable suspicions that the *cestui que trust* has been induced to enter into the contract by coercion, undue influence, fraud, misrepresentation or mistake, it is his duty to refuse to convey; and he will not be visited with the costs of a suit to compel him to convey, even

[1] Goodson *v.* Ellison, 3 Russ., 583; Poole *v.* Pass, 1 Beav., 600.
[2] Goodson *v.* Ellison, 3 Russ., 589.
[3] Taylor *v.* Glanville, 3 Madd., 178.
[4] Goodson *v.* Ellison, 3 Russ., 583.
[5] Holford *v.* Phipps, 3 Beav., 434.
[6] Saunders *v.* Neville, 2 Vern., 428; Goodson *v.* Ellison, 3 Russ., 583.
[7] Hartley *v.* Burton, L. R., 3 Ch., 365.
[8] Goodson *v.* Ellison, 3 Russ., 594, *per* Lord Eldon.

though it appears that the suspicions were unfounded. But he must take some steps to ascertain whether or not the contract is really of an improper character; mere suspicion is not of itself sufficient to warrant a refusal to convey, for enquiry may show that it is groundless.[1]

If the property is liable to succession duty, the trustee must see that it is paid.[2]

Right of *cestui que trust* to have trust carried out.

The *cestui que trust* has the right to have the intention of the author of the trust specifically enforced to the extent of his particular interest. The Specific Relief Act[3] provides, that the specific performance of any contract may, in the discretion of the Court, be enforced, (*a*) when the act agreed to be done is in the performance, wholly or partly, of a trust, and the following illustration is appended to the section: "*A* holds certain stock in trust for *B*. *A* wrongfully disposes of the stock. The law creates an obligation on *A* to restore the same quantity of stock to *B*, and *B* may enforce specific performance of this obligation."

The other parties entitled may express a desire that the trust should be differently administered; but if such a divergence from the donor's will would prejudice or injuriously affect the rights of any one *cestui que trust*, he may compel the trustees to adhere strictly and literally to the line of duty prescribed to them.[4]

Right of *cestui que trust* to hold property absolutely.

If property is given to trustees to hold for the benefit of any persons until they attain some age over the age of majority, and then to pay it over to such persons absolutely, the Court will allow the *cestuis que trustent*, on attaining majority, to have the property handed over. The *cestuis que trustent*, if they have an absolute and indefeasible interest in the trust-property, are not bound to wait until the time fixed by the author of the trust. If some other person is to have the enjoyment of the property until the time fixed, then the *cestuis que trustent* must wait until the time arrives. Thus, if a fund is given to trustees to accumulate, and hand over to a certain person

[1] See Campbell *v.* Home, 1 Y. & C. C. C., 664; Firmin *v.* Pulham, 2 DeG. & Sm., 99; King *v.* King, 1 DeG. & J., 663; Hannah *v.* Hodgson, 30 Beav., 19. As to what amounts to coercion, undue influence, fraud, misrepresentation, and mistake, see Contract Act, IX of 1872, ss. 15, 16, 17, 18, 20, 21, 22, and *ante*, p. 107.

[2] Buttanshaw *v.* Martin, 1 Johns., 89.

[3] I of 1877, s. 12, cl (*a*).

[4] Lewin, 7th Edn., 589, s. 2, citing Deeth *v.* Hale, 2 Moll., 317.

LECTURE X.

on his attaining twenty-five, he may claim the fund on attaining majority. If, however, the trust is to pay the income to *A* until *B* attains twenty-five, and then to hand over the principal to *B*, *B* must wait until he attains twenty-five before he can claim the fund.[1] If a sum of money is bequeathed to trustees upon trust to purchase an annuity for a certain person who is of age, and there is no gift over, or provision for cesser, he may claim the sum given, instead of the annuity.[2] So a trust for the maintenance of an adult, is a trust for his benefit generally, and the principal will, on his insolvency, pass to his assignee.[3]

Separate use.

There is one exception to the rule that a *cestui que trust*, who has an absolute interest in a trust-fund, may claim the fund on attaining majority,—namely, where property is settled upon a married woman for her separate use, without power of anticipation. In such a case she is not entitled to claim the fund, and cannot by any device evade the restraint upon anticipation.[4] The reason for this is the peculiar nature of this trust. It is intended as a provision for the wife, and the object would be defeated if the wife could obtain possession of the principal.

Right of *cestui que trust* to inspection.

Cestuis que trustent have a right at all reasonable times to inspect the documents relating to the trust, and at their own expense to be furnished with copies of them.[5] And where the relation of trustee and *cestui que trust* has been established, all cases submitted, and opinions taken, by the trustee to guide himself in the administration of his trust, and not for the purpose of his own defence in any litigation against himself, must be produced to the *cestui que trust*.[6]

Custody of title-deeds.

Trustees do not act negligently in leaving documents of title in the hands of one of their number and allowing him to receive the income. The reason is, that the deeds must be held by some one person, unless they are deposited with bankers or placed in a box secured by a number of

[1] Josselyn *v.* Josselyn, 9 Sim., 63; Saunders *v.* Vautier, 4 Beav., 115; Cr. and Ph., 240; Curtis *v.* Lukin, 5 Beav., 147; Rocke *v.* Rocke, 9 Beav., 66; Gosling *v.* Gosling, Johns., 265; Pearson *v.* Lane, 17 Ves., 101; Magrath *v.* Morehead, L. R., 12 Eq., 491.

[2] Dawson *v.* Hearn, 1 R. & M., 606; *Re* Browne's Will, 27 Beav., 324.

[3] Younghusband *v.* Gisborne, 1 Coll., 400.

[4] Stanley *v* Stanley, L. R., 7 Ch. Div., 589.

[5] *Ex parte* Holdsworth, 4 Bing., N C., 386.

[6] Wynne *v.* Humberston, 27 Beav., 421.

different locks, of which each trustee should hold one of the keys, and negligence cannot be imputed to trustees for not taking such precautions as these.[1]

Right of *cestui que trust* to alienate his interest.

A *cestui que trust*, if competent to contract, may alienate or devise his interest in the trust-fund,[2] even if his interest only amounts to a bare possibility.[3] The *cestui que trust* may exercise this right of ownership without the intervention of the trustees, who have no power of interfering,[4] and where the *cestui que trust* conveys his interest in the trust-fund to a purchaser, the purchaser may institute a suit against the trustee for a conveyance of his interest.[5] But a mere right to sue a trustee for the chance of recovering from him interest or profits of part of the trust-funds in respect of which he is alleged to have committed a breach of trust, is not assignable.[6]

Cautions in assignments of equitable interest.

"The purchaser of an equitable interest in *choses-in-action* should, for his security, never dispense with the two following precautions: *First*, he should make inquiries of the trustee or debtor whether the equity or claim of the vendor has been made the subject of any prior incumbrance. The purchaser, as the implied agent of the *cestui que trust*, has a right to require all the necessary information; and if the trustee or debtor refuse to answer the inquiry, or be guilty of misrepresentation, or even of misstatement from forgetfulness, the purchaser may charge him personally with the amount of the consequent loss. *Secondly*, upon the execution of the assignment, the purchaser should himself give notice of his own equitable title to the trustee or debtor, by means of which he will gain precedence of all prior incumbrancers who have not been equally diligent, and will prevent the postponement of himself to subsequent incumbrancers more diligent than himself; and of course the trustee or debtor will be personally responsible, if after such notice he parts with the fund to any person not having a prior claim."[7]

[1] Cottam *v.* Eastern Counties Railway Co., 1 J. and H., 247.
[2] Lord Cornbury *v.* Middleton, 1 Ch. Ca., 211; Burgess *v.* Wheate, 1 Eden, 195.
[3] Goring *v.* Bickerstaff, 1 Ch. Ca., 8. See as to transfer of *choses-in-action*, Mayne's Hindu Law, § 331.
[4] Philips *v.* Brydges, 3 Ves., 127.
[5] Goodson *v.* Ellison, 3 Russ., 583; Jones *v.* Farrell, 1 DeG. and J., 208.
[6] Hill *v.* Boyle, L. R., 4 Eq., 260.
[7] Lewin, 7th Edn., 602.

LECTURE X.

Separate use.

If property is settled upon a married woman for her separate use without power of anticipation, she cannot, upon the same principle that prevents her from claiming the trust-fund (see *ante*, p. 272), part with her interest in the trust-fund. But a general restriction against alienation is against the policy of the law, and will not operate to prevent the *cestui que trust* from parting with his interest.[1]

Method of conveyance.

As far as regards persons other than European British subjects, the *cestui que trust* may convey his interest by word of mouth. The 9th section of the Statute of Frauds, which provides that all grants and assignments of any trust or confidence must be in writing, signed by the party granting or assigning the same, otherwise they are utterly void, is still in force, at least in the Presidency-towns, so far as regards European British subjects, and from them a writing is therefore necessary. This section refers to assignments by the *cestui que trust*.[2] Before the Statute, the transfer of an equitable interest might have been made by parol. A writing is all that is now necessary, but it is the practice to employ the same species of instrument and the same form of words in the transfer of equitable as of legal estates.[3]

Assignee takes subject to all equities.

The assignee of the interest of a *cestui que trust*, as a general rule, takes it subject to all the equities to which it was liable in the hands of the assignor,[4] and he may even be liable to equities subsequently attaching. Thus, if an executor assigns his reversionary legacy, and is subsequently guilty of a *devastavit*, the legacy must make good the loss thereby occasioned.[5]

Set-off.

The assignee takes subject to any right of set-off which may exist. In *Cavendish* v. *Geaves*,[6] the principles were thus stated by Lord Romilly, M. R.: "If a customer borrow money from his banker, and give a bond to secure it, and afterwards, on the balance of his general banking account, a balance is due to the customer from the same

[1] Snowdon *v.* Dales, 6 Sim., 524; Green *v.* Spicer, 1 R. and M., 395; Graves *v.* Dolphin, 1 Sim., 66; Brandon *v.* Robinson, 18 Ves., 429; Rochford *v.* Hackman, 9 Hare, 480; see *ante*, p. 40.

[2] Jerdein *v.* Bright, 2 J and H., 325.

[3] Lewin on Trusts, 7th Edn., 594

[4] Priddy *v.* Rose, 3 Mer., 86; Mangles *v.* Dixon, 3 H. L. C., 702; *Re* Natal Investment Co., L. R., 3 Ch., 355; Comp. Dickson *v.* Swansea Railway Co., L. R., 4 Q. B., 48.

[5] Morris *v* Livie, 1 Y. and C. C. C., 380; Irby *v.* Irby. 25 Beav., 632; Willes *v.* Greenhill, 29 Beav., 376.

[6] 21 Beav., 163.

bankers who are the obligees of the bond, a right to set off the balance against the money due on the bond will exist both at law and in equity.

"If, the firm were altered, and the bond assigned by the original obligees to the new firm, and notice of that assignment given to the debtor, and if after this a balance were due to him from the new firm (the assignees of the bond), then . . . . the customer would be entitled to set off the balance due to him against the bond-debt due from him.

"If, after the bond had been given, it had been assigned to strangers, and no notice of that assignment had been given to the original debtor (the obligor of the bond), then his rights would remain the same . . . and the assignees of the *chose-in-action* would be bound by the equities affecting their assignors.

"But if notice of that assignment had been given to the original debtor, no right of set off would exist for the balance subsequently due by the bankers to the obligor; because the persons entitled to the bond would, as the obligor knew, be different persons from the debtor to him on the general account with whom he had continued to deal.

"If the assignment of the bond had been made to the new firm with notice to the obligor, they would, if debtors on the general account, be liable to the same rights of set-off as if they had been the obligee.

"If after the alteration of the firm, and after the assignment of the bond to the new firm, with notice to the debtor or obligor of that assignment, an assignment had been made of the bond to strangers, and no notice of that second assignment was given to the obligor, then the rights of set-off would still remain to him in equity as against the first assignees of whose assignment he had notice, and the second assignees would be bound by it, because, as I have stated, the assignees of the bond take it subject to all the equities which affect the assignors."[1]

Mutual demands must be in respect of same rights.

Set-off will not be allowed where the mutual demands are between the parties in different rights, as if *A* give a legacy to *B*, and appoint *C* his executor, or executor and residuary legatee, *B* may sue *C* for the legacy, and *C* cannot set off a debt owing by *B* to *C* not as executor, but

[1] As to pleading set-off, see Act X of 1877, chap. viii.

LECTURE X.

in *C's* own right.[1] But a defendant may make such admissions in his written statement as to preclude himself from objecting to the set-off at the hearing. However, an admission of assets for payment of the legacy will not have that effect.[2]

Notice to trustees.

When the *cestui que trust* assigns his interest in the trust-fund, the assignee should take care to give notice to the trustees of the assignment. It is not necessary that notice should be given, but it is highly advisable.[3] *First*, in order to prevent a subsequent assignee from gaining priority by giving notice; for notice of the assignment of a *chose-in-action* gives priority, and is equivalent to the possession of personalty capable of actual delivery. The principles upon which the Court acts were thus stated by Sir T. Plumer in *Dearle* v. *Hall*:[4] "Wherever it is intended to complete the transfer of a *chose-in-action*, there is a mode of dealing with it, which a Court of Equity considers tantamount to possession,—namely, notice given to the legal depository of the fund. Where a contract respecting property in the hands of other persons, who have a legal right to the possession, is made behind the back of those in whom the legal estate is thus vested, it is necessary, if the security is intended to attach on the thing itself, to lay hold of that thing in the manner in which its nature permits it to be laid hold of,—that is, by giving notice of the contract to those in whom the legal interest is. By such notice, the legal holders are converted into trustees for the new purchaser, and are charged with responsibility towards him; and the *cestui que trust* is deprived of the power of carrying the same security repeatedly into the market, and of inducing third persons to advance money upon it, under the erroneous belief that it continues to belong to him absolutely, free from incumbrance, and that the trustees are still trustees for him and for no one else. That precaution is always taken by diligent purchasers and incumbrancers: if it is not taken there is neglect, and it is fit that it should be understood, that the solicitor who conducts the business for the party advancing the money is responsible for that neglect. The consequence of such neglect is, that the trustee of the fund remains ignorant of any alteration having been made in the equitable

[1] Lewin, 7th Edn., 599; and see Act X of 1877, s. 111, illus. (*a*).
[2] Lewin, 7th Edn., 599; and see *ante*, p. 56.
[3] Lewin, 7th Edn., 600. [4] 3 Russ., 1.

rights affecting it: he considers himself to be a trustee for the same individual as before, and no other person is known to him as his *cestui que trust.* The original *cestui que trust,* though he has in fact parted with his interest, appears to the world to be the complete equitable owner, and remains in the order, management, and disposition of the property as absolutely as ever, so that he has it in his power to obtain by means of it a false and delusive credit. He may come into the market to dispose of that which he has previously sold; and how can those who may chance to deal with him protect themselves from his fraud? Whatever diligence may be used by a *puisne* incumbrancer or purchaser, whatever inquiries he may make in order to investigate the title, and to ascertain the exact state of the original right of the vendor, and his continuing right, the trustees who are the persons to whom application for information would naturally be made, will truly and unhesitatingly represent to all who put questions to them, that the fund remains the sole absolute property of the proposed vendor. These inconveniences and mischiefs are the natural consequences of omitting to give notice to trustees, and they must be considered as foreseen by those who in transactions of that kind omit to give notice; for they are the consequences which in the experience of mankind usually follow such omissions. To give notice is a matter of no difficulty; and whenever persons, treating for a *chose-in-action,* do not give notice to the trustee or executor, who is the legal holder of the funds, they do not perfect their title; they do not do all that is necessary in order to make the thing belong to them in preference to all other persons; and they become responsible in some respects for the easily foreseen consequences of their negligence."[1]

Mortgage.

The assignment may be by way of mortgage, and in the case of mortgages of policies or shares, it would seem that the actual possession of the policy or certificate is immaterial as affecting the priority gained by notice.[2] Where a policy is deposited as security for money advanced, and the intention of the parties was only to give a lien by the

[1] And see Loveridge *v.* Cooper, 3 Russ., 30; Meux *v.* Bell, 1 Hare. 73; *Ex parte* Boulton, 1 DeG. and J., 163; Morris *v.* Cannan, 8 Jur., N. S., 653; *In re* Freshfield's Trust, L R., 11 Ch. Div., 198; Megji Hansraj *v.* Ramji Joita, 8 Bom H. C R., O. C., 177.

[2] Foster *v.* Cockerell, 3 C. and F., 456.

LECTURE X.

deposit, and not to confer an equitable right on the lender to receive the money, the instrument is not in the order and disposition of the borrower.[1] But if the deposit is made upon an agreement that the depositee shall have conferred upon him a right to the money, then as the debt would pass to the assignee, the instrument which is the title-deed to the debt will pass also.[2] Where a policy was to become void in certain cases, unless it "should have been legally assigned," it was held, that this meant "validly and effectually assigned," that an equitable charge, by mere deposit, came within the exception, and that notice of it to the office was unnecessary.[3]

Secondly.—Notice is necessary to prevent the trustee from paying over the trust-fund to the *cestui que trust*,[4] and in the case of a policy of assurance, to prevent the office from taking a surrender from him.[5]

Thirdly.—Notice is necessary in order to prevent *choses-in-action* in the possession, order, and disposition of an insolvent, or of which he is the reputed owner, from passing to the Official Assignee, for *choses-in-action* are goods and chattels within the reputed-ownership clause of the Insolvent Act.[6] The assignment of a policy of insurance does not take it out of the order and disposition of the assignor, if no notice is given to the insurer.[7] Shares in companies are not things in action within the Act;[8] but debentures of a company by which they undertake to pay a sum of money and interest, and charge the undertaking and property with the payment thereof are within it.[9]

Description of property.

The notice should specify the property charged with reasonable accuracy. A mistake will not vitiate the notice as against a subsequent purchaser, if the fund to be charged is mentioned.[10] Notice by parol is sufficient, but it is better to give it in writing.[11]

[1] Gibson *v.* Overbury, 7 M. & W., 555; Broadbent *v.* Varley. 12 C. B., N. S., 214. [2] Green *v.* Ingham, L. R., 2 C. P., 525.

[3] Dufaur *v.* The Professional Life Assurance Co., 25 Beav., 599.

[4] Jones *v.* Gibbons, 9 Ves., 410.

[5] Fortescue *v.* Barnett, 3 M. & K., 36. [6] 11 & 12 Vict., c. 21, s. 23.

[7] Williams *v.* Thorp, 2 Sim., 257; Green *v.* Ingham, L. R., 2 C. P., 525.

[8] Union Bank of Manchester, *In re* Jackson, L. R., 12 Eq., 354.

[9] *In re* Pryce, L. R., 4 Ch. Div., 685. As to equitable interests in shares, see *Ex parte*, Barry, L. R., 17 Eq., 113; and as to debts, North *v.* Gurney, 1 J. & H., 509.

[10] *Re* Bright's Trusts, 21 Beav., 430; Woodburn *v.* Grant, 22 Beav., 483.

[11] North British Insurance Co. *v.* Hallett, 7 Jur., N. S., 1263; *Ex parte* Agra Bank, *In re* Worcester, L. R., 3 Ch., 555.

What is sufficient notice.

Knowledge of an incumbrance acquired not by notice but *aliunde* is apparently sufficient. In *Lloyd* v. *Banks*,[1] Lord Cairns, L. C., said: "I do not think it would be consistent with the principles upon which this Court has always proceeded, if I were to hold that, under no circumstances, could a trustee, without express notice from the incumbrancer, be fixed with knowledge of an incumbrance upon the fund of which he is the trustee, so as to give the incumbrancer the same benefit which he would have had if he had himself given notice to the trustee. It must depend upon the facts of the case; but I am quite prepared to say that I think the Court would expect to find that those who alleged that the trustee had knowledge of the incumbrance had made it out, not by any evidence of casual conversation, much less by any proof of what would only be constructive notice, but by proof that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it in the execution of the trust. If it can be shown that in any way the trustee has got knowledge of that kind—knowledge which would operate on the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired—then I think the end is attained, and that there has been fixed upon the conscience of the trustee, and through that upon the trust-fund, a security against its being parted with in any way that would be inconsistent with the incumbrance which has been created."[2]

To whom notice to be given.

The person to whom notice is to be given is the person liable.[3] In the case of a company, notice to any officer who represents the company, such as the manager or agent,[4] or a director,[5] or official liquidator,[6] is sufficient. But notice to a shareholder is not.[7] Should the trustee disregard the notice and pay away the money to the *cestui que trust*,

[1] L. R., 3 Ch., 490.
[2] And see *Ex parte* Agra Bank, *In re* Worcester, L. R., 3 Ch., 555.
[3] *Ex parte* M'Turk, 2 Deac. 58.
[4] *Ex parte* Hennessey, 2 Dr. and War., 555; Thompson *v.* Tomkins, 2 Dr. and Sm., 8.
[5] *Ex parte* Stewart, 11 Jur., N. S., 25; *Ex parte* Agra Bank, L. R., 3 Ch., 555.
[6] *Re* Breech Loading Co., L. R., 5 Eq., 284.
[7] Martin *v.* Sedgwick, 9 Beav., 333.

LECTURE X.

he will be personally liable.[1] Notice to the solicitor of trustees or of the person liable, is notice to the client.[2] But notice to a solicitor employed in one transaction is not notice to him when employed for another person in a different transaction.[3] The circumstances of a mortgagor being a solicitor and preparing the mortgage-deed, and of the mortgagee employing no other solicitor, are not sufficient to constitute the former the solicitor of the latter, so as to affect him with notice of an incumbrance known to the solicitor.[4]

Agents.

When the agent of a company and the assignor are the same person, notice to the agent is not sufficient.[5]

Notice to one of several trustees.

Notice to one of several trustees is sufficient during his lifetime,[6] but it is better that notice should be given to all.[7] If only one trustee has had notice, and he dies, or ceases to be trustee, a subsequent incumbrancer will gain priority by giving notice to a surviving or other trustee prior to any notice to him by the first incumbrancer.[8]

Notice before trust-fund received.

Notice to persons who are not trustees, though they are likely to be trustees, or before they have actually received the trust-fund, is nugatory.[9]

Bankers.

When funds are in a banker's hands for distribution on a particular day, notice given after business hours on the previous day gives no priority over a notice given on the morning of that day and before the commencement of business.[10]

Trustee purchaser.

A trustee who becomes the purchaser or mortgagee of the interest of his *cestui que trust* should give notice to one of his co-trustees.[11] If a trustee assign to a co-trustee,

[1] Andrews *v.* Bousfield, 10 Beav., 511; Stephens *v.* Venables, 30 Beav., 627.

[2] Rickards *v.* Gledstanes, 4 Giff., 298; Atterbury *v.* Wallis, 8 D. M. G., 454; Sharpe *v.* Foy, L. R., 4 Ch., 35; Rolland *v.* Hart, L. R., 6 Ch., 678.

[3] Lloyd *v.* Attwood, 3 DeG. and J., 614.

[4] Espin *v.* Pemberton, 3 DeG. and J., 547.

[5] *Re* Hennessey, 2 Dr. and War., 555. As to notice to agents or others who have themselves advanced money, see Webster *v.* Webster, 31 Beav., 393; Somerset *v.* Cox, 33 Beav., 634; Megji Hansraj *v.* Ramji Joita, 8 Bom. H. C. R., O. C., 178.

[6] Willes *v.* Greenhill, 4 D. F. J., 147.

[7] Smith *v.* Smith, 2 Cr. and M., 231.

[8] Timson *v.* Ramsbottom, 2 Ke., 35; Meux *v.* Bell, 1 Hare, 73.

[9] Buller *v.* Plunkett, 1 J. and H., 441; Somerset *v.* Cox, 33 Beav., 634; Calisher *v.* Forbes, L. R., 7 Ch., 109; Addison *v.* Cox, L. R., 8 Ch., 76.

[10] Calisher *v.* Forbes, L. R., 7 Ch., 109.

[11] Timson *v.* Ramsbottom, 2 Ke., 35; *Ex parte* Smart, 2 Mon. and A., 60; Commissioners of Public Works *v.* Harby, 23 Beav., 508.

that is sufficient notice,[1] otherwise if he assign to a stranger.[2] When a fund is subject to the trusts of a settlement, and is under the control of the trustees of it, and then is assigned to other trustees of another settlement in trust for a particular person who mortgages, notice should be given to the first trustees who have the fund in their hands.[3] As between the assignor or his representatives and the assignee,[4] or as against a subsequent incumbrancer who has notice of the prior charge, notice is unnecessary.[5]

Non-payment.

It may be observed that the assignee of a debt is not bound to give notice of its nonpayment to the assignor.[6] Where two assignments are contained in one deed, notice of one is not constructive notice of the other.[7]

Mortgagee.

A mortgagee who gives notice has priority over a *cestui que trust* claiming under a declaration of trust, of which no notice has been given.[8]

Immoveable property.

These rules as to notice do not extend to interests in immoveable property as such,[9] neither do they to stock or money directed to be converted, which in equity is immoveable property,[10] though notice is necessary of mortgages of the proceeds of land directed to be sold or mortgaged,[11] or of portions directed to be raised by means of a term, or generally of any charge which can only reach the person entitled in the shape of money.[12]

Stop-order.

Where the subject-matter of the mortgage is a fund in Court, a stop-order, that the fund shall not be transferred without notice to the mortgagee, should be obtained from the officer in charge of the fund. This will be equivalent to notice to the trustees of the fund.[13] Mere notice to the

[1] Browne *v.* Savage, 4 Drew., 635.
[2] *Ibid;* see Willes *v.* Greenhill, 4 D F. J., 147.
[3] Bridge *v.* Beadon, L. R., 3 Eq., 664; Holt *v.* Dewell, 4 Hare, 447.
[4] *Re* Lowe's Settlement, 30 Beav., 95.
[5] Warburton *v* Hill, Kay, 470.
[6] Glyn *v* Hood, 1 D. F J., 334.
[7] *Re* Bright's Trusts, 21 Beav., 430.
[8] Martin *v.* Sedgwick, 9 Beav, 333; Newton *v.* Newton, L. R., 6 Eq., 140. As to the equities between a *cestui que trust* and mortgagee of shares in a company, see Murray *v.* Pinkett, 12 C. and F., 784.
[9] Wiltshire *v.* Rabbits, 14 Sim., 76; Wilmot *v.* Pike, 5 Hare, 14.
[10] *Re* Carew, 16 W. R. (Eng.), 1077.
[11] Foster *v.* Cockrell, 3 C and F., 456; Consol, etc. Co *v.* Riley, 1 Giff., 371; Lee *v.* Howlett, 2 K. and J., 531.
[12] *Re* Hughes, 2 H. and M., 89; Barnes *v.* Pinkney, 36 L. J., Ch., 815.
[13] Greening *v.* Beckford, 5 Sim., 195; Swayne *v.* Swayne, 11 Beav., 463.

LECTURE X.

officers in charge would not be equivalent to a stop-order.[1] Notice to the trustees of a fund before it is paid into Court gives priority over a subsequent incumbrancer of it after it is paid in, though the latter alone obtains a stop-order.[2] A stop-order only operates in respect of a charge existing at the time of the order.[3]

Right to execution of trust.

If a trust has been properly created either by the declaration of the author, or by implication of law, it will not be allowed to fail for want of a trustee.[4] Thus, if property is bequeathed to trustees upon certain trusts, and the trustees die in the lifetime of the testator, the trusts will not be void;[5] or if the trustee disclaims,[6] or is incapable of taking,[7] or if the trustee fail from any other cause, the failure will be supplied by the Court.[8] "I take it," said Wilmot, C. J., "to be a first and fundamental principle in equity, that the trust follows the legal estate wheresoever it goes, except it comes into the hands of a purchaser for valuable consideration without notice. A Court of Equity considers devises of trust as distinct substantive devises, standing on their own basis independent of the legal estate, and the legal estate is nothing but the shadow which always follows the trust-estate in the hands of a Court of Equity."[9]

Suit for execution of trust.

If the trustee fails, the *cestui que trust* may institute a suit for the execution of the trust, and the trust will be executed by the Court until trustees can be appointed. "The Court," said Lord Eldon, "will not permit the negligence of the trustee, accident, or other circumstances to disappoint the interests of those for whose benefit the trust is to be executed."[10] "The person who creates a trust," said Wilmot, C. J., "means it should at all events be executed. The individuals named as trustees are only the

[1] Warburton *v.* Hill, Kay, 470.
[2] Livesey *v.* Harding, 23 Beav., 141; see Brearcliffe *v.* Dorrington, 4 DeG. and S., 122.
[3] Macleod *v.* Buchanan, 33 Beav., 234.
[4] White *v.* Baylor, 10 Ir. R., Eq., 53.
[5] Moggridge *v* Thackwell, 3 Bro. C. C., 528; Attorney-General *v.* Lady Downing, Ambl., 551.
[6] Backhouse *v.* Backhouse, V. C. of England, 20th Decr., 1844, cited Lewin, 7th Edn., 706.
[7] Sonley *v.* The Clockmakers' Co., 1 Bro. C. C., 81
[8] Attorney-General *v.* Stephens, 3 M. and K., 352.
[9] Attorney-General *v.* Lady Downing, Wilm., 21, cited Lewin, 7th Edn., 707.
[10] Brown *v.* Higgs, 8 Ves., 574.

nominal instruments to execute that intention, and if they fail, either by death, or by being under disability, or by refusing to act, the constitution has provided a trustee. Where no trustees are appointed at all, this Court assumes the office. There is some personalty in every choice of trustees; and if the trust cannot be executed through the medium which was in the primary view of the testator, it must be executed through the medium which the constitution has substituted in its place."[1]

Intention of author of trust carried out.

In executing a trust, the Court acts upon and carries out the intention of the author of the trust, and does not go beyond it, except in cases where the parties have the same common interest, or those who have an adverse interest are consenting. And the Court will, in some cases, act retrospectively, as in directing past maintenance.[2] The difficulty and impracticability of carrying the trust into execution will not prevent the Court from acting. However arduous the trust is, the Court will carry it into execution.[3] However difficult it may be to select the persons intended to be benefited, and though it must depend from the nature of the trust upon the opinion of the trustees as to the merits of the persons who are the objects, yet the Court will execute the trust. If a trust can by any possibility be exercised by the Court, the non-execution by the trustees shall not prejudice the *cestuis que trustent*.[4] If the settlor has laid down a rule for the trusts, or if he has empowered his trustees to act upon a certain state of facts of which the Court can be informed by evidence, and judge as well as the trustees could, the Court can make the judgment as well as the trustees, and when informed by the evidence, can judge what is just and equitable.[5] If no rule has been given by the trustees, the Court will generally act upon the maxim that "equality is equity."[6] If, however, the nature of the trust is such that equal division is impossible, the Court

[1] Attorney-General *v.* Lady Downing, Wilm., 23, cited Lewin, 7th Edn., 708.

[2] Maberly *v.* Turton, 14 Ves., 499; Edwards *v.* Grove, 2 DeG. F. and J., 222.

[3] Pierson *v.* Garnet, 2 Bro. C. C., 46.

[4] Brown *v.* Higgs, 5 Ves., 504.

[5] Gower *v.* Mainwaring, 2 Ves. Sr., 87.

[6] Malim *v.* Keighley, 2 Ves. Jr., 333; Brown *v.* Higgs, 5 Ves., 504; Birch *v.* Wade, 3 V. and B., 198; Burrough *v.* Philcox, 5 My. and Cr., 73; Fordyce *v.* Bridges, 2 Phil., 497; Salusbury *v.* Denton, 3 K. and J., 529; Izod *v.* Izod, 32 Beav., 242

LECTURE X.

still acts upon the maxim that if by any possibility the trust can be executed, the Court will do it.[1]

Right to proper trustees.

The *cestui que trust* has a right to have the trust-property administered by proper persons, and by a proper number of persons. If, therefore, a trustee dies,[2] or goes abroad,[3] the *cestui que trust*, even though only in remainder,[4] may sue to have the proper number of trustees filled up.

Suit for appointment of new trustees.

So, if a trustee disclaims the office or refuses to act,[5] or if there is a disability on the part of the trustee to act, as where he takes up his permanent residence abroad,[6] the *cestui que trust* may institute a suit to have him removed and to have a new trustee appointed in his place. The taking up a permanent residence abroad does not *ipso facto* deprive a trustee of his office, but still it is such a disqualification as entitles the *cestui que trust* to have a new trustee appointed.[7] So it is a good ground for the removal of a trustee and the appointment of a new trustee that he has become insolvent,[8] although insolvency, as we have seen (*ante*, p. 131), is not necessarily a disqualification for the office. Again a trustee may be removed if he misapplies the revenues of the trust-property, and grossly misbehaves himself in the execution of the trust,[9] as by renewing a lease for his own benefit,[10] purchasing the trust-property,[11] concurring in a breach of trust,[12] or absconding under a charge of forgery.[13]

"If the trust be under the administration of the Court, and the surviving trustee dies, the appointment of other trustees is not a matter of course, but rests in the discretion of the Court, having regard to the state of the trust at the time."[14]

[1] As to powers, see Lewin, 7th Edn., 708.
[2] Hibbard *v.* Lamb, Ambl., 309.
[3] Buchanan *v.* Hamilton, 5 Ves., 722.
[4] Finlay *v.* Howard, 2 Dru. and War., 490.
[5] Wood *v.* Stane, 8 Price, 613; *Anon.*, 4 Ir. Eq. Rep., 700.
[6] *In re* Ledwich, 4 Ir. Eq. Rep; Commissioners of Charitable Donations Archbold, 11 Ir. Eq. Rep., 187; O'Reilly *v.* Alderson, 8 Hare, 101.
[7] O'Reilly *v.* Alderson, 8 Hare, 101.
[8] Bainbrigge *v.* Blair, 1 Beav., 495; Commissioners of Charitable Donations *v.* Archbold. 11 Ir. Eq. Rep., 187; Harris *v.* Harris, 29 Beav., 107; *In re* Adam's Trust, L. R., 12 Ch. Div., 634.
[9] *In re* Powell, 6 N. W. P., 54; Mayor of Coventry *v.* The Attorney-General, 7 Bro. P. C., 235; Buckeridge *v.* Glasse, 1 Cr. and Ph., 126.
[10] *Ex parte* Phelps, 9 Mod., 357.
[11] *Ex parte* Reynolds, 5 Ves., 707.
[12] *Ibid.*
[13] Millard *v.* Eyre, 2 Ves. Jr., 94.
[14] Lewin, 7th Edn., 720.

In a suit filed by the *cestui que trust* for the purpose of removing a trustee, it is not scandalous or impertinent to challenge every act of the trustee as misconduct, nor to impute to him any corrupt or improper motive in the execution of the trust, nor to allege that his conduct is the vindictive consequence of some act on the part of the *cestui que trust*, or of some change in his situation; but it is impertinent, and may be scandalous, to state any circumstances as evidence of general malice or personal hostility.[1]

Costs.

If the trustee is removed on the ground of misconduct, he must bear the costs of the suit, as it is an act necessitated by himself.[2]

Grounds for removal of trustee.

The Court will not discharge a trustee merely because, in the exercise of his discretion, he refuses to do some act required by his *cestui que trust*, as where he refuses to consent to a particular investment, even though the trustee is willing to be relieved from the trust.[3] Nor will the Court remove a trustee because he has been under a misunderstanding as to his duty.[4]

Where it appeared that the co-trustees were unwilling to act in the trust with the trustee who was sought to be discharged, and he insisted on being continued, Lord Nottingham said,—"I like not that a man should be ambitious of a trust, when he can get nothing but trouble by it;" and without any reflection on the trustee, declared that he should meddle no further in the trust.[5]

Where the Court appoints new trustees, it will not give them the power of appointing new trustees in their stead.[6]

Rules for selecting new trustees.

In appointing new trustees, the fitness of the proposed new trustee is a matter for consideration. The author of the trust is unfettered in his selection of trustees, but when the Court appoints new trustees, it requires to be satisfied as to their fitness for the office. Near relations of the *cestui que trust*, though they may be appointed by the person creating the trust, will not be appointed by the Court except in cases of absolute necessity.[7]

[1] Earl of Portsmouth *v.* Fellows, 5 Mad., 450.

[2] *Ex parte* Greenhouse, 1 Mad., 92.

[3] Pepper *v.* Tuckey, 2 J and Lat., 95; Lee *v.* Young, 2 Y. and C C. C., 532.

[4] Attorney-General *v.* The Coopers' Co., 19 Ves, 192; Attorney-General *v.* Caius College, 2 Keen, 150.

[5] Uvedale *v.* Ettrick, 2 Ch. Cas., 130.

[6] Oglander *v.* Oglander, 2 DeG. and Sm., 381; Holder *v.* Durbin, 11 Beav., 594.

[7] Wilding *v.* Bolder, 21 Beav., 222.

LECTURE X.

In re Tempest.

The principles upon which the Court acts in appointing new trustees were thus stated by Turner, L. J., in *In re Tempest:*[1]—"It was said in argument, and it has been frequently said, that, in making such appointments, the Court acts upon and exercises its discretion; and this, no doubt, is generally true; but the discretion which the Court has and exercises in making such appointments, is not, as I conceive, a mere arbitrary discretion, but a discretion in the exercise of which the Court is, and ought to be, governed by some general rule and principles; and, in my opinion, the difficulty which the Court has to encounter in these cases lies not so much in ascertaining the rules and principles by which it ought to be guided, as in applying those rules and principles to the varying circumstances of each particular case. The following rules and principles may, I think, safely be laid down as applying to all cases of appointments, by the Court, of new trustees:—

"First, the Court will have regard to the wishes of the persons by whom the trust has been created, if expressed in the instrument of trust, or clearly to be collected from it. I think this rule may be safely laid down, because if the author of the trust has in terms declared that a particular person, or a person filling a particular character, should not be a trustee of the instrument, there cannot, as I apprehend, be the least doubt that the Court would not appoint to the office a person whose appointment was so prohibited; and I do not think that upon a question of this description any distinction can be drawn between express declarations and demonstrated intention. The analogy of the course which the Court pursues in the appointment of guardians affords, I think, some support to this rule. The Court in those cases attends to the wishes of the parents, however informally they may be expressed.

"Another rule which may, I think, safely be laid down is this—that the Court will not appoint a person to be trustee with a view to the interest of some of the persons interested under the trust, in opposition either to the wishes of the testator or to the interests of others of the *cestuis que trustent.* I think so for this reason, that it is of the essence of the duty of every trustee to hold an even hand between the parties interested under the trust. Every trustee is in duty bound to look to the interests of all, and not

[1] L. R., 1 Ch., 485.

of any particular member or class of members of his *cestuis que trustent.*

A third rule which, I think, may safely be laid down, is—that the Court, in appointing a trustee, will have regard to the question, whether his appointment will promote or impede the execution of the trust, for the very purpose of the appointment is, that the trust may be better carried into execution."

And as another rule, it may be said, that the Court will have regard to the wishes of the persons, if any, empowered to appoint new trustees.[1]

Right to compel trustee to do act of duty.

We have seen (*ante*, p. 137) that a trustee is bound to protect the trust-estate; and if he fails in his duty, the *cestui que trust* may institute a suit to compel him to act.[2] Where, by the terms of a marriage settlement, a trustee was to compel payment of a sum of money due on covenant, but by consent of the *cestuis que trustent* the money was left outstanding on that security, it was held, upon their subsequent application to have the money called in and invested, that the trustee was bound, if necessary, to enforce payment by an action on the covenant without requiring any indemnity from the *cestuis que trustent;* and in default of so doing, he was compelled to pay the costs of a suit brought against him to enforce the execution of the covenant.[3]

Injunction.

Not only may a *cestui que trust* institute a suit to compel a trustee to do any particular act of his duty as such, but he may obtain an injunction to restrain his trustee from doing any act which would amount to a breach of trust. It is a principle of the Court of Equity that a trustee shall not be permitted to use the powers which the trust may confer upon him except for the legitimate purposes of the trust.[4] The Specific Relief Act[5] provides that "a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. When the defendant invades, or threatens to invade, the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following case (namely):—

"(*a*) When the defendant is a trustee for the plaintiff."

[1] Middleton *v.* Reay, 7 Hare, 106.

[2] Foley *v.* Burnell, 1 Bro. C. C., 277; Crossley *v.* Crowther, 9 Hare, 386.

[3] Kirby *v.* Mash, 3 Y. and C. Ex., 295; and see Fletcher *v.* Fletcher, 4 Hare, 78.

[4] Balls *v.* Strutt, 1 Hare, 146; M'Fadden *v.* Jenkyns, 1 Ph., 153; Wiles *v.* Gresham, 17 Jur., 779.

[5] I of 1877, s. 54.

LECTURE X.

And the following illustration is appended to the section, —"A trustee threatens a breach of trust. His co-trustees, if any, should, and the beneficial owners may, sue for an injunction to prevent the breach of trust."[1] When the act complained of would, if done, be irremediable, the Court will interfere as a matter of course.[2] The jurisdiction of the Court, however, rests not upon the fact that the injury would be irremediable, but upon the breach of trust.[3] If a sale by trustees is conducted in such a manner that, as between the trustees, who have the power of sale, and the *cestuis que trustent*, it constitutes a breach of trust, the *cestuis qui trustent* are entitled to prevent the sale from being completed, leaving the purchaser to his remedy against the trustees.[4] Any one of the *cestuis que trustent*, however small his interest may be, and though an infant, may sue.[5] Although the words of an Act be imperative, and there is no qualification on the face of the section, the inherent authority of a Court of Equity to repress fraud and prevent unfair dealing, and to exercise a wholesome control over persons standing in the character of trustees, empowers the Court to look into the circumstances and to decide whether it ought or not to do that which the Legislature has, *primâ facie*, commanded to be done. An injunction accordingly was granted, on a proper case being made out, to restrain the directors of a company from acting on an order for payment out of Court to them of a sum of money, notwithstanding the words of the Act under which the order was made were imperative.[6] A *cestui que trust*, who has a common interest with others in the trust-property, is entitled to sue on behalf of himself and the others for the protection of the property by injunction.[7] And the Court may interfere by injunction, even though no breach of trust has been

[1] See *In re* Chertsey Market, 6 Price, 279.

[2] *Ite* Chertsey Market, 6 Price, 279; Attorney-General *v.* Foundling Hospital, 2 Ves. Jr., 42; Reeve *v.* Parkins, 2 J. and W., 390.

[3] Webb *v.* Earl of Shaftesbury, 7 Ves., 487; Attorney-General *v.* Corporation of Liverpool, 1 M. and Cr., 210; Attorney-General *v.* Aspinall, 2 M. and Cr., 613; Milligan *v.* Mitchell, 1 M. and K., 446; *Anon.*, 6. Madd., 10, overruling Pechel *v.* Fowler, 2 Anst., 549.

[4] Dance *v.* Goldingham, L. R., 8 Ch., 902.

[5] *Ibid*, 913.

[6] Kerr on Injunctions, 2nd Edn., 462, citing Goodman *v.* De Beauvoir, 4 Ra. Ca., 381.

[7] Scott *v.* Becher, 4 Price, 346; and see Dance *v.* Goldingham, L. R., 8 Ch., 902.

committed, if from the character of the trustee it is probable that the trust-fund may be lost or injured. Thus, an injunction against parting with the trust-property may be obtained against an insolvent trustee,[1] or one who is proved to be of bad character, drunken habits, and great poverty.[2] But the Court will not grant such an injunction merely because the trustee is poor.[3]

Wrongful purchase by trustee.

There is another important class of cases in which a *cestui que trust* has the right to seek the assistance of a Court of Equity against his trustee,—namely, those in which the trustee has improperly purchased the trust-estate.[4] I now propose to consider the nature of the relief which the Court will grant in such cases.

The *cestui que trust*, or his representatives, may, if the property is still in the hands of the trustee, insist upon a reconveyance by the trustee,[5] who will be discharged at once.[6]

If the trustee has sold the property to a purchaser with notice of the breach of trust, the *cestui que trust* can insist upon a reconveyance by the purchaser.[7]

The reconveyance will be without prejudice to the interests of persons, such as lessees, who have contracted with the trustee or his vendor *bonâ fide* before the suit was instituted.[8]

Interest.

The *cestui que trust* must, on the reconveyance, repay the purchase-money with interest,[9] which in this country would be at the rate of 6 per cent. Where a trustee had paid a part of the purchase-money into Court, and it had

[1] Mansfield *v.* Shaw, 3 Mad., 100; Scott *v.* Becher, 4 Price, 346; Taylor *v.* Allen, 2 Atk., 213.

[2] Everett *v.* Prythergch, 12 Sim., 365.

[3] Howard *v.* Papera, 1 Mad., 143; Hathornthwaite *v.* Russell, 2 Atk., 126. As to interfering in the case of religious trusts, see Kerr on Injunctions, 2nd Edn., 463.

[4] See *ante*, p. 256.

[5] Lord Hardwicke *v.* Vernon, 4 Ves., 411; *Ex parte* James, 8 Ves., 351; *Ex parte* Bennett, 10 Ves., 400; Randall *v.* Errington, 10 Ves., 423; York Buildings Co. *v.* Mackenzie, 8 Bro. P. C., 42; Hamilton *v.* Wright, 9 C. and F., 123.

[6] *Ex parte* Bennett, 10 Ves., 400.

[7] Dunbar *v.* Tredennick, 2 Ball and B., 304; Pearson *v.* Benson, 28 Beav., 598.

[8] York Buildings Co. *v.* Mackenzie, 8 Bro. P. C., 42.

[9] Hall *v.* Hallet, 1 Cox, 134; Watson *v.* Toone, 6 Mad., 153; Campbell *v.* Walker, 5 Ves., 682; *Ex parte* James, 8 Ves., 351; York Buildings Co. *v.* Mackenzie, 8 Bro. P. C., 42.

LECTURE X.

been invested in stock, the value of which had risen when the purchase was set aside, it was held, that he was only entitled to his purchase-money with interest, for, if the stock had fallen instead of advancing, he could not have been compelled to take it.[1] The trustee must account for the profits of the trust-property come to his hands,[2] but not with interest.[3] If, however, he was in possession, he will be charged with an occupation-rent.[4]

Allowance for outlay.

If the trustee has expended money in substantial improvements or lasting repairs,[5] or such as have a tendency to bring the estate to a better sale,[6] he will be allowed credit for the moneys so expended. In estimating the improvements, old buildings, if incapable of repair, will be valued as old materials, but otherwise as buildings standing.[7] On the other hand, the trustee will be charged for acts that deteriorate the value of the estate.[8] When the contract is vitiated by the presence of actual fraud, allowance will still be made to the trustee for necessary repairs,[9] and in one case allowance was made for material repairs and lasting improvements.[10] But in another case of actual fraud the Court refused any allowance for improvements. "If," said Lord Fitzgibbon, "a man has acquired an estate by rank and abominable fraud, and shall afterwards expend his money in improving the estate, is he therefore to retain it in his hands against the lawful proprietor? If such a rule should prevail, it would justify a proposition I once heard at the bar, that the common equity of the country was to improve the right owner out of the possession of his estate."[11]

Reconveyance.

Where a reconveyance is directed, it must be made at once, unless the trustee is given a lien for the balance on taking the accounts.[12]

[1] *Ex parte* James, 8 Ves., 351.
[2] *Ex parte* Lacey, 6 Ves., 630; *Ex parte* James, 8 Ves., 351; Watson *v.* Toone, 6 Mad., 153; York Buildings Co. *v.* Mackenzie, 8 Bro., P. C, 42.
[3] Macartney *v.* Blackwood, cited Lewin, 7th Edn., 444.
[4] *Ex parte* James, 8 Ves., 351.
[5] *Ex parte* Hughes, 6 Ves., 624; *Ex parte* James, 8 Ves., 352.
[6] *Ex parte* Bennett, 10 Ves., 400; York Buildings Co. *v.* Mackenzie, 8 Bro., P. C., 42.
[7] Robinson *v.* Ridley, 6 Mad., 2.
[8] *Ex parte* Bennett, 10 Ves., 401.
[9] Lewin, 7th Edn., 444, citing Baugh *v.* Price, 1 G. Wils., 320.
[10] Oliver *v.* Court, 8 Price, 172.
[11] Lewin, 7th Edn., 445, citing Kenney *v.* Browne, 3 Ridg., 518.
[12] Trevelyan *v.* Charter, 9 Beav., 140.

The *cestui que trust* may, instead of a reconveyance, require the property to be resold. If he adopts this course, the practice is to put up the estate for auction at the price given by the trustee, together with any sums expended by him for repairs and improvements. If any advance is made, the trustee will not be allowed to have the estate; if not, he will be held to his bargain.[1]

Interest.

If the trustee bought the estate in one lot, and the *cestui que trust* is desirous of selling it in several lots, he must repay the trustee his purchase-money with interest, and then may sell as he likes.[2]

If the trustee has resold the estate, he must account for any profit with interest.[3]

If a trustee, who has purchased the trust-estate, sells to a purchaser for value without notice, the *cestui que trust* may charge the trustee, either with the difference between the price for which the trustee gave, and the price at which he sold,[4] or the real value of the estate at the time of sale[5] with interest.[6]

Costs.

Where a sale to a trustee is set aside, the trustee must pay the costs of the suit.[7] But if there be great delay on the part of the *cestui que trust*, costs will be refused him, though he succeed in the suit;[8] and, on the other hand, if the suit be dismissed, not merely because the transaction was not originally impeachable, but merely on account of the great interval of time, the Court may refuse to order the costs of the defendant.[9]

Following trust-estate into hands of third persons. Volunteers.

We have now to consider the rights of the *cestui que trust* as against third persons to whom the trust-property has been wrongfully conveyed. If the person to whom the property has been conveyed is a volunteer,—that is to

[1] *Ex parte* Reynolds, 5 Ves., 707; *Ex parte* Hughes, 6 Ves., 617; *Ex parte* Lacey, *ib.*, 625; Lister *v.* Lister, *ib.*, 631; *Ex parte* Bennett, 10 Ves., 381; Robinson *v.* Ridley, 6 Mad., 2.

[2] *Ex parte* James, 8 Ves., 351.

[3] *Ex parte* Reynolds, 5 Ves., 707; Hall *v.* Hallet, 1 Cox, 134.

[4] Fox *v.* Mackreth, 2 Cox, 320; Hall *v.* Hallet, 1 Cox, 134; Whichcote *v.* Lawrence, 3 Ves., 740; *Ex parte* Reynolds, 5 Ves., 707; Randall *v.* Errington, 10 Ves., 422.

[5] Lord Hardwicke *v.* Vernon, 4 Ves., 416.

[6] Hall *v.* Hallet, 1 Cox, 139.

[7] Sanderson *v.* Walker, 13 Ves., 601; Hall *v.* Hallet, 1 Cox, 141; Whichcote *v.* Lawrence, 3 Ves., 740; Dunbar *v.* Tredennick, 2 B. and B., 304.

[8] Lewin, 7th Edn., 447; Attorney-General *v.* Lord Dudley, G. Coop., 146.

[9] Lewin, 7th Edn., 447, citing Gregory *v.* Gregory, G. Coop., 200.

LECTURE X.

say, a person who has given no consideration for the conveyance, the trust-estate may be followed into his hands, whether he had notice of the trust or not, for the Court implies notice where no consideration has passed.[1]

Purchasers for value.

If the person into whose hands the property has come, purchased it for valuable consideration, with notice of the trust, he is bound to the same extent and in the same manner as the person from whom he purchased.[2], "If," said Lord Hardwicke, "a person will purchase with notice of another's rights, his giving a consideration will not avail him, for he throws away his money voluntarily, and of his own free will."[3]

So, a purchaser will be affected with any incumbrance on the estate if he had notice of it when he purchased,[4] or of a lien for unpaid purchase-money.[5] And the assignee of a *chose-in-action* must take it subject, as we have just seen, to all the equities.[6]

"The rules of this Court," said Malins, V. C.,[7] "are perfectly well settled, and are the rules of honesty and fair dealing, that no party to an illegal or fraudulent contract can derive any benefit from it; and that all persons who obtain possession of trust-funds, with a knowledge that their title is derived from a breach of trust, will be compelled to restore such trust-funds."

Purchase from guardian.

When a person, after attaining majority, questions any sale of property made by his guardian during his minority, the burden lies on the person who upholds the purchase, not only to show that, under the circumstances of the case, either the guardian had the power to sell, or that the purchaser reasonably supposed that he had such power, but

[1] Mansell *v.* Mansell, 2 P. Wms., 678; Saunders *v.* Dehew, 2 Vern., 271.

[2] Dunbar *v.* Tredennick, 2 Ball and B., 319; Adair *v.* Shaw, 1 Sch. and Lef., 262; Mead *v.* Lord Orrery, 3 Atk., 238; Mackreth *v.* Symmons, 15 Ves., 350; Mansell *v.* Mansell, 2 P. Wms., 681; Heath *v.* Crealock, L. R., 10 Chan., 22; Mancharji Sorabji Chulla *v.* Kongseoo, 6 Bom. H C. R., O. C., 59; Dayal Jairaj *v.* Jivraj Ratansi, I. L. R., 1 Bomb., 237; Bego Jan *v.* Luteefun, 5 W. R., 120.

[3] Mead *v.* Lord Orrery, 3 Atk., 238.

[4] Kennedy *v.* Daly, 1 Sch. and Lef., 355; Crofton *v.* Ormsby, 2 Sch. and Lef., 583; Daniels *v.* Davison, 16 Ves., 249; Mancharji Sorabji Chulla *v.* Kongseoo, 6 Bom. H. C. R, O. C., 59.

[5] Mackreth *v.* Symmons, 15 Ves., 329; Dunbar *v.* Tredennick, 2 B. and B., 320; Yellappa-bin-Basappa *v.* Mantappa-bin-Basappa, 3 Bom. H. C., A. C., 102.

[6] See further, Lewin, 7th Edn., 732.

[7] Gray *v.* Lewis, L. R., 8 Eq., 543

further, that the whole transaction as regards the purchaser's part in it was *bonâ fide*. When either the person who sells labours under a disqualification, or the purchaser stands in a fiduciary relation to the owner of the property, the *bona fides* of the dealing cannot be presumed, but must be made out by the purchaser.[1]

Notice of trust.

The notice need not be express, but may be constructive. The principle of constructive notice is, that a man shall be deemed to know such matters affecting the property which he purchases, as would have come to his knowledge if he had made proper inquiries. Where one of three trustees, who was also the solicitor of the purchaser, executed an assignment of leasehold property held jointly by them to a purchaser, and forged the signatures of his two co-trustees, and also the requisite assent of the *cestui que trust* to the sale, it was held, that the circumstances attending the transaction were sufficient to affect the purchaser with notice of some trust, if not the actual nature of it; and that he had constructive notice of the trust through the knowledge of his solicitor.[2]

Purchaser for valuable consideration without notice.

If, however, the trust-property is conveyed to a purchaser for valuable consideration without notice of the trust, the purchaser is entitled to hold the property discharged of the trust, leaving the *cestuis que trustent* to their remedy against the trustees.[3] "From a purchaser for value without notice," said James, L. J.,[4] "the Court takes away nothing which that purchaser has honestly acquired. If the purchaser has got possession of a piece of parchment or of property, or of anything else which he thought he was getting honestly, this Court, in my opinion, has no right to interfere with him."

Purchaser without notice from purchaser with notice.

A purchaser without notice from a purchaser with notice is not liable. He is in the same position as if he had himself originally purchased without notice, and the fact that the sale to him was fraudulent does not affect him.[5]

Purchaser with notice from purchaser without.

Nor is a purchaser with notice from a purchaser without

[1] Roop Narain Singh *v.* Gugadhur Pershad Narain, 9 W. R., 297.

[2] Boursot *v.* Savage, L. R., 2 Eq., 134.

[3] Mansell *v.* Mansell, 2 P. Wms., 681; Dunbar *v.* Tredennick, 2 Ball & B., 318; Jones *v.* Powles, 3 M. & K., 581; Payne *v.* Compton, 2 Y. & C. C. C., 457; Thorndike *v.* Hunt, 3 DeG. & J., 563.

[4] Heath *v.* Crealock, L. R., 10 Ch., 33.

[5] Ferrars *v.* Cherry, 2 Vern., 384; Mertins *v.* Jolliffe, Ambl., 313; Salusbury *v.* Bagott, 2 Swanst., 606.

LECTURE X.

notice liable, the reason being, Lord Hardwicke says, to prevent stagnation of property.[1]

Fraud.

If a purchaser, however honest, on the completion of his purchase, acquires a defective title, the Court will not allow that defective title to be strengthened, either by his own fraud, or by the fraud of any other person.[2]

Doubtful equity.

In some cases it may be doubtful what construction would be put on the instrument of trust, and the purchaser may take with a doubtful equity. The question may then arise, how far the purchaser would be bound. Upon this point Lord Leonards said, that where, upon the whole articles, it is plain what construction the Court would have put upon them had it been called upon to execute them at the time they were made, they should be enforced, however difficult the construction might be, even as against a purchaser with notice, but not after a lapse of time, where there was anything so equivocal or ambiguous in them as to render it doubtful how they ought to be effectuated.[3]

Following converted trust-property.

Where a trustee has wrongfully disposed of trust-property, the *cestui que trust* may follow the purchase-money, or any other property that has been substituted in the place of the trust-estate, in the hands of the trustee or his representatives; and such substituted property will be impressed with the same trusts as the original trust-property was subject to.[4] Thus, if a trustee expends the whole of the trust-money in the purchase of land, the *cestui que trust* will be entitled to the land.[5]

Proof of purchase with trust-money.

The *cestui que trust* must, of course, prove that the land was purchased with the trust-moneys. This may be proved, either by direct evidence, as where trust-money was paid to a trustee, by a cheque, which was next day paid over by him in part-payment for the estate,[6] or by mere parol evidence of declarations by the trustees; but these, in the

[1] Mertins *v.* Jolliffe, Ambl., 313; Salusbury *v.* Bagott, 2 Swanst., 606.

[2] Heath *v.* Crealock, L. R., 10 Ch., 33, *per* James, L. J. As to getting in the legal estate, see Lewin, 7th Edn., 729.

[3] Thompson *v.* Simpson, 1 Dr. & War., 491.

[4] Taylor *v.* Plummer, 3 M. & S., 575; Rani Kattama Nachiar *v.* Bothagurusami Tevar, 6 Mad. H. C. R., 293; Greender Chunder Ghose *v.* Mackintosh, I. L. R., 4 Calc., 908.

[5] Trench *v.* Harrison, 17 Sim., 111; Taylor *v.* Plummer, 3 M. & S., 575.

[6] Price *v.* Blackmore, 6 Beav., 507; *Ex parte* Chadwick, 15 Jur., 597; Mathias *v.* Mathias, 3 Sm. & Giff., 552.

absence of corroborating circumstances, will be received with great caution.[1] The presumption, however, is, that a purchase made by a trustee, whose duty is so to invest trust-money, has been made in execution of the trust.[2] And where a trustee paid in trust-moneys (applicable to be invested in the purchase of real estate), and moneys of his own, to his general account at his bankers, and then bought real estate, and paid for it by a cheque on his bankers, the Court—the purchase having proved a beneficial one—decided that the *cestuis que trustent* were entitled to hold, that such payment was made out of that part of the moneys standing to the general account which it was proper so to employ,—*i.e.*, the trust-moneys.[3]

The mere fact that a trustee has trust-money in his hands when he makes a purchase, is not sufficient to attach the trust to lands bought by him.[4] The fact that a trustee for purchase of lands has purchased lands, does not necessarily raise the presumption that he invested the trust-money in the purchase. Such a presumption may, however, be raised when the sum paid is the precise, or nearly precise, amount of trust-money.[5]

Money, notes, or negotiable instruments.

Where the trust-property has been converted into money, currency notes, or negotiable instruments, greater difficulty arises in tracing it in the hands of the trustee or his representatives. It was at one time said that such property could not be traced, because it had no 'earmark.' But in *Miller* v. *Race*,[6] Lord Mansfield said: "It has been quaintly said 'that the reason why money cannot be followed is, because it has no earmark;' but this is not true. The true reason is, upon account of the currency of it, it cannot be recovered after it has passed in currency. So, in case of money stolen, the true owner cannot recover it, after it has been paid away fairly and honestly upon a valuable and *bonâ fide* consideration; but before money has passed in currency, an action may be brought for the money itself. There was a

[1] Lench *v.* Lench, 10 Ves., 519.
[2] Trench *v.* Harrison, 17 Sm., 111.
[3] Manningford *v.* Toleman, 1 Coll., 670; see Dart V. & P., 5th Edn., 939.
[4] Lewin, 7th Edn., 765, citing Sealy *v.* Stawell, 3 I. R., Eq., 326.
[5] Price *v.* Blakemore, 6 Beav., 507; Mathias *v* Mathias, 3 Sm. & G., 552; Perry *v.* Phelips, 4 Ves., 108: see also Denton *v.* Davies, 18 Ves., 499; Lewis *v.* Madocks, 8 Ves., 150; 17 Ves., 48.
[6] 1 Burr., 452.

LECTURE X.

case in 1 G., 1, at the sittings—*Thomas* v. *Whip*—before Lord Macclesfield, which was an action upon *assumpsit* by an administrator against the defendant for money had and received to his use. The defendant was nurse to the intestate during his sickness; and being alone, conveyed away the money. And Lord Macclesfield held, that the action lay. Now this must be esteemed a finding at least. Apply this to a case of a bank-note,—an action may lie against the finder, it is true; but not after it has been paid away in currency." "It makes no difference in reason or law," said Lord Ellenborough, C. J.,[1] "into what other form, different from the original, the change may have been made,—whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal, or into other merchandize, for the product of, or substitute for, the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way,—*i. e.*, as predicated only of an undivided and undistinguishable mass of current money. But money in a bag, or otherwise kept apart from other moneys, guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, are so far earmarked as to fall within the rule on this subject, which applies to every other description of personal property whilst it remains in the hand of the factor or his general legal representatives."

These cases show, that money and notes, if not paid away to a *bonâ fide* holder, can be followed into the hands of a trustee. And it has been decided that the same principle applies to bills of exchange and other negotiable instruments.[2] And they may be followed when the transferree had express notice of the trust.[3] The difference between money and notes and negotiable instruments is, that the particular coin cannot be distinguished, but notes

[1] Taylor *v.* Plumer, 3 M. and S., 575.
[2] Frith *v.* Cartland, 2 H. and M., 417.
[3] Joy *v.* Campbell, 1 Sch. and Lef., 345.

and negotiable instruments are distinguishable, as they have distinct marks and numbers on them.[1]

Trust-fund mixed with trustee's money.

Trust-funds may be followed, although the trustee has mixed them with his own money, as by paying them into his own account at a bank. If the trustee has employed the trust-money, together with his own money, in the purchase of an estate, the *cestui que trust* will have a lien over the purchased estate for the whole amount of the fund misapplied, though no particular part of the estate was purchased with the trust-money only.[2] The guiding principle in all cases of this class is, that a trustee cannot assert a title of his own to trust-property. If he destroys a trust-fund by dissipating it altogether, there remains nothing to be the subject of a trust. But so long as the trust-property can be traced and followed into other property into which it has been converted, that remains subject to the trust. A second principle is, that if a man mixes trust-funds with his own, the whole will be treated as the trust-property, except so far as he may be able to distinguish what is his own.[3]

Pennell v. Deffell.

The doctrines upon which a Court of Equity acts in following trust-moneys were very fully discussed in the case of *Pennell* v. *Deffell*.[4] There a trustee paid various trust-funds to his credit at two banks, and the question was, how far the moneys at his credit belonged specifically to the trust. Knight Bruce, L. J., said: "Let us suppose that the several sums for which the trustee was accountable at his death had been (that is to say, that the very coins and the very notes received by him on account of the trusts respectively had been) placed by him together in a particular repository, such as a chest, mixed confusedly together as among themselves; but in a state of clear and distinct separation from everything else, and had so remained at his death. It is, I apprehend, certain, that, after his death, the coins and notes thus circumstanced would not have formed part of his general assets, would not have been permitted so to be used, but would have been specifically applicable to the purposes of the trusts on account of

[1] Ford *v.* Hopkins, 1 Salk., 283.

[2] Lane *v.* Dighton, Amb., 409; Lewis *v.* Madocks, 17 Ves., 57; Price *v.* Blakemore, 6 Beav., 507; Ernest *v.* Croysdill, 2 DeG. F. and J., 175; Nogender Chunder Ghose *v.* Greender Chunder Ghose, Boul., 389.

[3] Frith *v.* Cartland, 2 H. and M., 420, *per* Wood, V. C.

[4] 4 D. M. G., 372.

LECTURE X.

which he had received them. Suppose the case that I have just suggested to be varied only by the fact, that in the same chest, with these coins and notes, the trustee had placed money of his own (in every sense his own) of a known amount, had never taken it out again, but had so mixed and blended it with the rest of the contents of the chest, that the particular coins or notes of which this money of his own consisted, could not be pointed out—could not be identified,—what difference would that make? None, as I apprehend, except (if it is an exception) that his executor would possibly be entitled to receive from the contents of the repository an amount equal to the ascertained amount of the money in every sense his own, so mixed by himself with the other money. But not in either case, as I conceive, would the blending together of the trust-moneys, however confusedly, be of any moment as between the various *cestuis que trustent* on the one hand, and the executors as representing the general creditors on the other.

"Let it be imagined that, in the second case supposed, the trustee, after mixing the known amount of money of his own with the trust-moneys, had taken from the repository a sum for his own private purposes, and it could not be ascertained whether in fact the specific coins and notes forming it included or consisted of those or any of those which were, in every sense, his own specifically,—what would be the consequence? I apprehend that, in equity at least, if not at law also, what he took would be solely or primarily ascribed to those contents of the repository which were in every sense his own. He would, in the absence of evidence that he intended a wrong, be deemed to have intended and done what was right; and if the act could not in that way be wholly justified, it would be deemed to have been just to the utmost amount possible. If these propositions, which I believe to be founded on principle, and supported by authorities, are true,—can the plaintiff be wholly wrong in his actual contention? I apprehend not . . . . When a trustee pays trust-money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done, had it specifically been

placed by the trustee in a particular repository and so remained,—that is to say, if the specific debt shall be claimed on behalf of the *cestuis que trustent*, it must be deemed specifically theirs, as between the trustee and his executors and the general creditors after his death on the other, whether the *cestuis que trustent* are bound to take to the debt—whether the deposit was a breach of trust, is a different question.

"This state of things would not, I apprehend, be varied by the circumstance of the bank holding also for the trustee, or owing also to him money in every sense his own."

And Turner, L. J., said: "It is, I apprehend, an undoubted principle of this Court, that, as between *cestui que trust* and trustee, and all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to, or affected by, the trust.

"This principle cannot be better illustrated than by referring to a case of familiar, almost daily occurrence, the case of trust-moneys employed in trade. An executor of a deceased partner continues his capital in the trade with the concurrence of the surviving partners, and carries on the trade with them. The very capital itself may consist only of the balance which at the death of the partner was due to him on the result of the partnership account. That capital may have no existence but in the stock-in-trade and debts of the partnership. The stock-in-trade may undergo a continual course of change and fluctuation, and yet this Court follows the trust capital throughout all its ramifications, and gives to the beneficiaries of the deceased partner's estate the fruits derived from that capital so continually altered and changed." His Lordship then referred to the supposed impossibility of ascertaining what portions of the balances at the banker's belonged to the trust, and what portion to the estate of the trustee, and continued: "In order to test this question, suppose a trustee pays into a bank moneys belonging to his trust to an account not marked or distinguished as a trust-account, and pays in no other moneys: could it for one moment be denied that the moneys, standing to the account of the debt due from the banker's arising from the moneys so paid in, would

LECTURE X.

belong to the trust and not to the private estate of the trustee? Then suppose the trustee subsequently pays in moneys of his own, not belonging to the trust, to the same account: would the character of the moneys which he had before paid in, if the debt which had before accrued, be altered? Again, suppose the trustee, instead of subsequently paying moneys into the bank, draws out part of the trust-moneys which he has before paid in: would the remainder of those moneys and of the debt contracted in respect of them lose their trust character? Then, can the circumstance of the account consisting of a continued series of moneys paid in and drawn out alter the principle? It may, indeed, increase the difficulty of ascertaining what belongs to the trust, but I can see no possible ground on which it can affect the principle."

Re Hallett's Estate.

In the recent case of *In re Hallett's Estate, Knatchbull* v. *Hallett*,[1] trust-money had been paid in by a trustee to his own account at his bankers, and the question was, whether the rule in *Clayton's case*,[2] that the first drawings out by the trustee must be attributed to the first payments, applied to the case of a trustee mixing his moneys with the trust-funds; and it was held, that it did not, the Court dissenting to this extent from *Pennell* v. *Deffell*.[3] "The modern doctrine of equity," said Jessel, M. R., "as regards property disposed of by persons in a fiduciary position, is a very clear and well-established doctrine. You can, if the sale was rightful, take the proceeds of the sale, if you can identify them. There is no distinction, therefore, between a rightful and a wrongful disposition of the property so far as regards the right of the beneficial owner to follow the proceeds. The proceeds may have been invested together with money belonging to the person in a fiduciary position in a purchase. He may have bought land with it, for instance, or he may have bought chattels with it. Now what is the position of the beneficial owner as regards such purchases? I will, first of all, take his position when the purchase is clearly made with what I will call, for shortness, the trust-money, although it is not confined, as I will show presently, to express trusts. In that case, according to the now well-established doctrine of equity, the beneficial owner

[1] L. R., 13 Ch. Div., 696. [2] 1 Mer., 572.
[3] 4 D. M. G., 372.

has a right to elect either to take the property purchased, or to hold it as a security for the amount of the trust-money laid out in the purchase; or, as we generally express it, he is entitled at his election either to take the property, or to have a charge on the property for the amount of the trust-money. But in the second case, where a trustee has mixed the money with his own, there is this distinction, that the *cestui que trust*, or beneficial owner, can no longer elect to take the property, because it is no longer bought with the trust-money simply and purely, but with a mixed fund. He is, however, still entitled to a charge on the property purchased for the amount of the trust-money laid out in the purchase; and the charge is quite independent of the fact of the amount laid out by the trustee. The moment you get a substantial portion of it furnished by the trustee, using the word 'trustee' in the sense I have mentioned, as including all persons in a fiduciary relation, the right to the charge follows." His Lordship then stated that there was no distinction between an express trustee, an agent, a bailee, or a collector of rents, or anybody else in a fiduciary position; and continued: "Now that being the established doctrine of equity on this point, I will take the case of the pure bailee. If the bailee sells the goods bailed, the bailor can in equity follow the proceeds, and can follow the proceeds wherever they can be distinguished, either being actually kept separate, or being mixed up with other moneys. I have only to advert to one other point, and that is this—supposing, instead of being invested in the purchase of land or goods, the money were simply mixed with other moneys of the trustee, using the term again in its full sense as including every person in a fiduciary relation,—does it make any difference according to the modern doctrine of equity? I say none. It would be very remarkable if it were to do so. Supposing the trust-money was 1,000 sovereigns, and the trustee put them into a bag, and by mistake or otherwise dropped a sovereign of his own into the bag, could anybody suppose that a Judge in equity would find any difficulty in saying that the *cestui que trust* has a right to take 1,000 sovereigns out of that bag? I do not like to call it a charge of 1,000 sovereigns on the 1,001 sovereigns, but that is the effect of it. I have no doubt of it. It would make no difference if, instead of one sovereign, it was another 1,000 sovereigns; but if instead of putting it into his bag, or after putting it into his bag

LECTURE X.

he carries the bag to his bankers,—what then? According to law the bankers are his debtors for the total amount; but if you lend the trust-money to a third person, you can follow it. If, in the case supposed, the trustee had lent the £1,000 to a man without security, you could follow the debt and take it from the debtor. If he lent it on a promissory note, you could take the promissory note; or the bond, if it were a bond. If, instead of lending the whole amount in one sum simply, he had added a sovereign, or had added £500 of his own to the £1,000, the only difference is this, that, instead of taking the bond or the promissory note, the *cestui que trust* would have a charge for the amount of the trust-money on the bond or promissory note. So it would be on the simple contract debt; that is, if the debt were of such a nature as that, between the creditor and debtor, you could not sever the debt into two, so as to show what part was trust-money, then the *cestui que trust* would have a right to a charge upon the whole." And Thesiger, L. J., said: "The principle may be stated, as it appears to me, in the form of a very simple, though at the same time very wide and general, proposition. I would state that proposition in these terms,—namely, that wherever a specific chattel is intrusted by one man to another, either for the purposes of safe custody or for the purpose of being disposed of for the benefit of the person intrusting the chattel, then either the chattel itself, or the proceeds of the chattel, whether the chattel has been rightfully or wrongfully disposed of, may be followed at any time, although either the chattel itself or the money constituting the proceeds of that chattel, may have been mixed and confounded in a mass of the like material."

Upon the question as to whether the principle of *Clayton's case*[1] could be applied to the case of trust-moneys, Jessel, M. R., said: "Nothing can be better settled either in our own law, or, I suppose, the law of all civilized countries, than this, that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly. . . . When we come to apply that principle to the case of a trustee who has blended trust-moneys with his own, it seems to me perfectly plain that he cannot be heard to say that he took the trust-money when he had a right to take away his own

[1] Mer., 572.

money. The simplest case put is the mingling of trust-moneys in a bag with money of the trustee's own. Suppose he has a hundred sovereigns in a bag, and he adds to them another hundred sovereigns of his own, so that they cannot be distinguished, and the next day he draws out for his own purposes £100,—is it tolerable for any one to allege that what he drew out was the first £100, the trust-money, and that he misappropriated it, and left his own £100 in the bag? It is obvious that he must have taken away that which he had a right to take away, his own £100. What difference does it make if, instead of being in a bag, he deposits it with his banker, and then pays in other money of his own, and draws out some money for his own purposes? Could he say that he had actually drawn out anything but his own money? His money was there, and he had a right to draw it out, and why should the natural act of simply drawing out the money be attributed to anything except to his ownership of money which was at his bankers." And Baggallay, L. J., agreed with Jessell, M. R. But Thesiger, L. J., while agreeing with the reasoning of the Master of the Rolls, felt himself bound by *Pennell* v. *Deffell*[1] as being the judgment of a Court of co-ordinate jurisdiction.

Lien.

If the trust-fund has been employed together with money belonging to the trustee in the purchase of land, the *cestui que trust* will have a lien on the whole land for the trust-money and interest.[2] But if the trust-fund only has been so employed, the *cestui que trust* has a right to the land itself.[3]

Limitation

It is a well settled principle of equity that time is no bar to a claim by a *cestui que trust* against his trustee in the case of an express trust.[4] Nor is it a bar against a purchaser with notice,[5] but it is otherwise in the case of a constructive trust.[6] Thus, time was held to be a bar as between a *cestui que trust* and a person who had become possessed of the trust-estate even by reason of the breach of trust on the part of the trustee.[7]

[1] 4 D. M. G., 372.
[2] Scales *v.* Baker, 28 Beav., 91; Hopper *v.* Conyers, L. R., 2 Eq., 549.
[3] Trench *v.* Harrison, 17 Sim., 111; see *ante*. p. 294.
[4] Chalmer *v.* Bradley, 1 Jac. & W., 51; see M. S. Ameerun *v.* M. S. Hyatun, 16 S. D. A., 443.
[5] Luteefun *v.* Bego Jan, 5 W. R., 120.
[6] Beckford *v.* Wade, 17 Ves., 97.
[7] Bonney *v.* Ridgard, 1 Cox, 145; Townsend *v.* Townsend, 1 Bro. C. C., 550; Andrew *v.* Wrigley, 4 Bro. C. C., 125; Beckford *v.* Wade, 17 Ves., 97.

LECTURE X.

Section 10 of Act XV of 1877 provides, that "no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands, such property, shall be barred by any length of time." This section is substantially the same as s. 10 of Act IX of 1871, which has been construed to mean, that when a trust has been created expressly for some specific purpose or object, and property has become vested in a trustee upon such trust (either from such person having been originally named as trustee, or having become so subsequently by operation of law), the person or persons who for the time being may be beneficially interested in that trust may bring a suit against such trustee to enforce that trust at any distance of time without being barred by limitation; and further, that the language of the section is specially framed so as to exclude implied trusts, or such trusts as the law would infer merely from the existence of particular facts or fiduciary relations.[1] And in *Greender Chunder Ghose* v. *Mackintosh*,[2] it was held by Garth, C. J., that the words "in trust for a specific purpose" are intended to apply to trusts created for some defined or particular purpose or object, as distinguished from trusts of a general nature, such as the law impresses upon executors and others who hold fiduciary positions; and by White, J., that those words are used in a restrictive sense, and limit the character and nature of the trust attaching to the property which is sought to be followed, and that the phrase is a compendious form of expression for trusts of the nature and character mentioned in arts. 133 and 134 of sched. ii to the Act,—namely, such as attach to property conveyed in trust, deposited, pawned or mortgaged.

Where a clause of the *wajib-ul-arz* of a village stated in general terms that absconders from such village should receive back their property on their return, and certain persons who absconded from such village before such *wajib-ul-arz* was framed, sued to enforce such clause against the purchaser of their property from the co-sharer who had taken possession of it on their absconding, and who was no party to such *wajib-ul-arz*, alleging that their property

[1] Kherodemoney Dossee v. Doorgamoney Dossee, I. L. R., 4 Calc., 455.
[2] *Ibid*, 897.

had vested in such co-sharer in trust for them, it was held, that, assuming the trust to be established, as the purchaser had purchased in good faith for value and without notice of the trust, and was not the representative of such co-sharer within the meaning of s. 10 of Act IX of 1871, and had been more than twelve years in possession, the suit was barred by limitation.[1]

Accrual of cause of action.

Where property has been placed in the hands of another by way of trust, no cause of action arises to the owner until there has been a demand by him for the restoration of the property and a refusal by the trustee to give up the property. The period of limitation begins to run from the date of such refusal or distinct assertion of adverse right, and not from the date the trustee enters into possession.[2]

A suit to make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust, must be brought within three years from the date of the trustee's death, or if the loss has not then resulted, the date of the loss.[3]

Suits to recover possession of moveable or immoveable property conveyed or bequeathed in trust, and afterwards purchased from the trustee for a valuable consideration, must be brought within twelve years from the date of purchase.[4]

Fraud.

No time will cover a fraud so long as it remains concealed; for, until discovery (or at all events until the fraud might with reasonable diligence have been discovered), the title to avoid the transaction does not properly arise. But after discovery, the defendant may avail himself of the Statute, for he has a right to say, "You shall not bring this matter under discussion at this distance of time; it is entirely your own neglect that you did not do so within the time limited by the Statute."[5]

Section 18 of Act XV of 1877 provides that "when any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, or where any document necessary to establish

[1] Piarey Lall v. Saliga, I. L. R., 2 All., 394; see also Kamal Singh v. Batul Fatima, *ib.*, 460.

[2] Rakhaldas Madak v. Madhu Sudan Madak, 3 B. L. R., A. C., 409.

[3] Act XV of 1877, sched ii, art. 98.

[4] Act XV of 1877, sched. ii, arts 133, 134.

[5] Lewin, 7th Edn., 739; see Durga Prasad v. Asa Ram I. L. R., 2 All., 361.

LECTURE X.

such right has been fraudulently concealed from him, the time limited for instituting a suit or making an application (*a*) against the person guilty of the fraud or accessory thereto, or (*b*) against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it, or compelling its production."

Purchase from manager of joint Hindu family.

A person who lends money to, or purchases from, the manager of a joint Hindu family governed by the Mitakshara law, is bound to enquire into the necessity for the loan or sale.[1] The leading case on this point is *Hunooman Persaud Panday* v. *M.S. Babooee Munraj Koonweree.*[2] Their Lordships of the Privy Council say: "The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But of course, if that danger arises, or has arisen, from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore the lender in this case, unless he is shown to have acted *mala fide*, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt. Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged, sufficient, and reasonably credited necessity is not a condition precedent to the validity of his charge; and they

[1] M. S. Nowruttun Koer *v.* Baboo Gouree Dutt Singh, 6 W. R., 193.
[2] 6 Moo. I. A., 393.

do not think that, under such circumstances, he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security; and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improper management; the purposes for which a loan is wanted are often future as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bonâ fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived."

Position of shebait.

The position of a shebait of a debutter estate is analogous to that of a manager of an infant heir, and the foregoing principles apply to the case of a purchaser from him.[1]

Duty of purchaser.

He who sets up a charge upon a minor's estate, created in his favour by the guardian, is bound to show, at least, that when the charge was so created, there was reasonable ground for believing that the transaction was for the benefit of the estate.[2] It is sufficient for the purchaser or lender to be satisfied of the fact of necessity; he need not inquire into its causes.[3] It is only necessary for him to establish that he made *bonâ fide* enquiry into the matter, and was in that inquiry reasonably led to suppose that the necessity did exist.[4]

Terms on which sale set aside.

When a sale is set aside, the plaintiff can only get possession on repayment of so much of the purchase-money as has been applied towards the liquidation of debts.[5]

Duty of manager.

It is the duty of the manager to pay off debts by strict economy if possible, and not to sell the property, because it is the easier mode of clearing the estate.[6] A sale of family property made by a Hindu father living under the Mitakshara law, merely to enable him to redeem a mortgage, the term of which has not nearly expired, is

[1] Konwar Doorganath Roy *v.* Ram Chunder Sen, I. L. R., 2 Calc., 341.

[2] Lalla Bunseedhur *v.* Koonwur Bindeseree Dutt Singh, 10 Moo. I. A., 461; Syud Tasouwar Ali *v.* Koonj Beharee Lal, 3 N. W. P., 10.

[3] Mohabeer Kooer *v.* Joobha Singh, 16 W. R., 221; Sheoraj Kooer *v.* Nukchedee Lall, 14 W. R., 72.

[4] Soorendro Pershad Dobey *v.* Nundun Misser, 21 W. R., 196.

[5] Muthoora Koonwaree *v.* Bootun Singh, 13 W. R., 30; see Koonwar Doorganath Roy *v.* Ram Chunder Sen, I. L. R., 2 Calc., 341.

[6] M. S. Bukshun *v.* M. S. Doolhin, 12 W. R., 337.

LECTURE X.

not made under such pressing legal necessity as would prevent his son from suing to set it aside if made without the son's acquiescence.

What is sufficient necessity.

Want of acquiescence on the son's part is sufficient to make the sale by the father void in the absence of legal necessity. It is not necessary that the sale by the father should be wasteful, it might even be advantageous.[1] A sale to pay debts and maintain the family is good,[2] so are sales to defray Government revenue or to defray funeral or marriage ceremonies.[3] Where the Court has expressly found the existence of debts, and that the sale of ancestral property was a *bonâ fide* one, the circumstance that there was no actual pressure at the time, in the shape of suits by the creditors for the recovery of their debts, is not of itself sufficient to invalidate the alienation.[4] The fact that there is a decree, an attachment, and a proclamation of sale,[5] or even a decree which may at any time be enforced against ancestral property,[6] is sufficient evidence of pressure and justification for a sale or mortgage. A sale of ancestral property merely for the purpose of procuring funds for the repurchase of other property formerly belonging to the family, cannot, of itself, be considered as a sale for any of the necessary purposes sanctioned by law.[7] Although, as a general rule, it may lie upon those who claim, under an alienation of ancestral property for necessary purposes, to show that the alienation was within the limited powers of the party alienating, yet particular circumstances may shift the burden of proof. No fixed rule can be laid down as to the degree of proof requisite in such cases.[8]

Sale to pay debts.

A father governed by the Mitakshara law may sell ancestral property in order to pay off debts which his sons would be under a pious obligation to pay after his death.[9] "The interests of the sons," said their Lord-

[1] Kullar Singh *v.* Modhoo Dyal Singh, 5 Wym., 28.
[2] Bisambhur Naik *v.* Sudasheeb Mohapattur, 1 W. R., 96.
[3] Sacaram *v.* Laxmabai, Perry, O. C., 129; Saravana *v.* Muttayi, 6 Mad. H. C., 371.
[4] Kaihur Singh *v.* Roop Singh, 3 N. W. P., 4.
[5] Sheoraj Kooer *v.* Nukchedee Lall, 14 W. R., 72.
[6] Purmessur Ojha *v.* M. S. Goolbee, 11 W. R., 446.
[7] Kaihur Singh *v.* Roop Singh, 3 N. W. P., 4.
[8] Kaihur Singh *v.* Roop Singh, 3 N. W. P., 4; Syud Tasouwar Ali *v.* Koonj Beharee Lal, 3 N. W. P., 10.
[9] Girdharee Lall *v.* Kantoo Lall, L. R., 1 I. A., 321; (S. C.) 14 B. L. R., 187.

ships of the Privy Council, "as well as the interest of the father in the property, although it is ancestral, is liable for the payment of the father's debts." Referring to this passage Phear, J., said:[1] "It would, therefore, seem to follow that any disposition of the property, which is reasonably made by the father for the purpose of discharging a debt of this kind, *i.e.*, a debt of the father, which does not fall within the exception (for immoral purposes) is one of those spoken of and authorized as 'unavoidable' by paras. 28 and 29, s. 1, chap. i, Mitakshara. The debt being of such a nature that the property is ultimately liable to discharge it, the alienation of that property, whether by mortgage or sale, by the father, upon reasonable terms, for the purpose of discharging the debt, must be substantially an unavoidable transaction."

The question in these cases is, whether the debt is one which, if left unsatisfied, the sons would, under the Hindu law, be under an obligation to discharge;[2] and the lender is bound to show for what purpose the loan was contracted, and that the purpose was one which justified the father in charging, or which the lender had at least good grounds for believing did justify the father in charging, the interests of the sons in the ancestral property.[3] In *Hunooman Persaud Panday* v. *M. S. Babooee Munraj Koonwaree*[4] their Lordships of the Privy Council said:—"As to the consideration for the bond the argument for the appellants in the reply, if correct, would indeed reduce the matter for consideration to a very short point; for, according to that argument, if the *factum* of a deed of charge by a manager for an infant be established, and the fact of the advance be proved, the presumption of law is *primâ facie* to support the charge, and the onus of disproving it rests on the heir. For this position a decision, or rather a *dictum* of the Sudder Dewany Adawlut at Agra in the case of *Oomed Rai* v. *Heera Lall*[5] was quoted and relied upon. But the *dictum* there, though general, must be read in connection with the facts of that case. It might be a very correct course to adopt with reference to suits of that particular character, which was one where

Hunooman Persaud Panday's case.

[1] Muddun Gopal Lall *v.* M. S. Gowrunbutty, 15 B. L. R., 271.
[2] Adurmoni Deyi *v.* Chowdhry Sibnarain Kur, I. L. R., 3 Calc., 5.
[3] Bheknarain Singh *v.* Januk Singh, I. L. R., 2 Calc., 445.
[4] 6 Moo. I. A., 418.
[5] 6 S. D. A., N. W. P., 218.

LECTURE X.

the sons of a living father were, with his suspected collusion, attempting to get rid of the charge on an ancestral estate created by the father on the ground of the alleged misconduct of the father in extravagant waste of the estate. Now it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate; whilst the antecedents of their father's career would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger; consequently this *dictum* may, perhaps, be supported on the general principle that the allegation and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge as well as on the obvious ground in such suits, of the danger of collusion between father and sons in fraud of the creditor of the former. But this case is of a description wholly different, and the *dictum* does not profess to be a general one, nor is it so to be regarded. Their Lordships think that the question, on whom does the onus of proof lie in such suits as the present, is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by, and dependent on, them. Thus, where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir,—namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan.

"It is to be observed that the representation by the manager accompanying the loan as part of the *res gestae*, and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir; and as their Lordships are informed that such *primâ facie* proof has been generally required in the Supreme Court of Calcutta between the lender and the heir, where the lender is enforcing his security against the heir, they think it reasonable and right that it should be required.

It is obvious, however, that it might be unreasonable to require such proof from one not an original party after a lapse of time, and enjoyment, and apparent acquiescence; consequently, if, as is the case here as to part of the charge, it be created by substitution of a new security for an older one, where the consideration for the older one was an old precedent debt of an ancestor not previously questioned, a presumption of the kind contended for by the appellant would be reasonable."[1]

Purchaser under execution.

A purchaser under an execution is not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or having given it, in putting up the property for sale under an execution upon it,[2] for a judgment-debt is *primâ facie* proof of necessity.[3]

The rule applies where a minor seeks to set aside a sale made by his guardian to pay off a decree against the minor.[4]

The decree alone is not, however, sufficient proof,[5] but there should be evidence of the nature of the debts on which the decree originated.[6]

In a suit by the members of an undivided family governed by the law of the Mitakshara, to set aside a sale of joint ancestral property which had been sold in execution of a decree obtained against their deceased father, on the ground that the debt was not one for which such property could be made liable, it appeared that, prior to the sale, the plaintiffs had preferred a claim of objection on the same grounds, and that the Court of execution

[1] See also Tandavaraya Mudali *v.* Valli Ammal, 1 Mad. H. C., 398; Lalla Bunseedhur *v.* Koonwar Bindescree Dutt Singh, 10 Moo. I. A., 461; Syud Tasouwar Ali *v.* Koonj Beharee Lal, 3 N. W. P., 10; Chowdhry Herasutoollah *v.* Brojo Soondur Roy, 18 W. R., 77.

[2] Muddun Thakoor *v.* Kantoo Lall, L. R., 1 I. A., 331; (S. C.) 14 B. L. R., 187, 199.

[3] M. S. Bhowna *v.* Roop Kishore, 5 N. W. P., 89; Budree Lall *v.* Kantee Lall, 23 W. R., 260; M. S. Kooldeep Kooer *v.* Runjeet Singh, 24 W. R., 231; Sheo Pershad Singh *v.* M. S. Soorjbunsee Kooer, *ib.*, 281; Burtoo Sing *v.* Ram Purmessur Singh, *ib.*, 364; M. S. Sham Soondur Kooer *v.* M S. Jumna Kooer, 25 W. R., 148; Ram Sahoy Singh *v.* Mohabeer Pershad, *ib.*, 185; Shah Wajed Hossein *v.* Baboo Nankoo Singh, *ib.*, 311; Luchmi Dai Koori *v.* Asman Singh, I. L R., 2 Calc., 213; Venkataramayyan *v* Venkatasubramania Dikshatar, I. L. R., 1 Mad, 358; Bika Singh *v.* Luchman Singh, I. L. R., 2 All., 800.

[4] Sheoraj Kooer *v.* Nuckchedee Lall, 14 W. R., 72; see further, Mayne's Hindu Law, s. 304, as to coparceners

[5] Pareyasami *v.* Saluckai Tevar, 8 Mad., 157.

[6] Reotee Singh *v.* Ramjeet, 2 N. W. P., 50.

LECTURE X.

had declined to adjudicate on the claim, and had directed the sale to proceed, referring the claimants to a regular suit,—it was held by the Privy Council, distinguishing the case of *Muddun Thakoor* v. *Kantoo Lall*,[1] that the purchasers must be taken to have had notice, actual or constructive, of the objections made to the sale by the plaintiffs, and of the order then made, and to have purchased with knowledge of the plaintiffs' claim, and subject to the result of their suit.[2]

Under Hindu law, where there is found to be an ancestral debt, and a sale is effected to pay it, the purchaser at such sale is not bound to inquire whether the debt could have been met from other sources.[3]

It may be shown that the ostensible purpose of the loan was to pay off Government revenue; but to render such a loan binding upon those who had reversionary interests in the property, it must also be satisfactorily proved that such loan was at the time absolutely necessary from failure of the resources of the estate itself, and was not raised through the caprice or extravagance of the proprietor.[4]

Where the lender has shown that a justifiable debt existed, and persons claiming through the borrower allege that it has been satisfied, the ordinary rule requires the party who alleges payment to prove payment, and the debt will not be presumed to be satisfied until the contrary is shown by the creditor.[5]

Purchase from heir of Mahomedan debtors.

The creditors of a deceased Mahomedan, whether in respect of dower or otherwise, cannot follow his estate into the hands of a *bonâ fide* purchaser for value to whom it has been alienated by the heir-at-law, whether by sale or mortgage. But where the alienation is made during the pendency of a suit in which the creditor obtains a decree for the payment of his debt out of the assets of the estate which have come into the hands of the heir-at-law, the alienee will be held to take with notice, and will be affected with the doctrine of *lis pendens*.[6]

[1] 14 B. L. R., 187; L. R., 1 I. A., 333.

[2] Suraj Bunsi Koer *v.* Sheo Porsad Singh, I. L. R., 5 Calc., 148; see Luchmun Dass *v.* Giridhur Chowdhry. I. L R, 5 Calc., 855

[3] Ajey Ram *v.* Girdharee, 4 N. W. P., 110.

[4] Damoodur Mohapattur *v.* Birjo Mohapatter, S. D. of 1858, p. 802.

[5] Cavaly Vencata Narrainapah *v.* The Collector of Masulipatam, 11 Moo. I. A., 633.

[6] Syud Bazayet Hossein *v.* Dooli Chund, I. L. R., 4 Calc., 402.

Acquisition by trustee of trust-property wrongfully converted.

If a trustee wrongfully disposes of trust-property to a *bonâ fide* purchaser for value, and subsequently becomes possessed of the same property, the trust attaches again, however many hands the property may have passed through in the meantime.[1]

Liability of executor or administrator to pay interest.

If an executor or administrator retains the assets of his testator after paying debts and legacies, and either neglects to invest or employ the surplus in his business,[2] and does not account to the residuary legatees or next-of-kin as the case may be, he will, after the expiration of the year which he is allowed[3] to realize his testator's assets,[4] be charged with interest on the amount he has retained.[5] And if the money has been employed in his business, he may be charged with compound interest.[6]

It is the duty of executors to make the fund productive, and if there is a debt due from the testator's estate which is carrying interest, they should apply the assets in paying the debt; and if they neglect to do so, they will be charged with the amount of the interest.[7]

So it has been held, that the trustee of a bankrupt's estate, who neglects to declare a dividend for the benefit of creditors, is liable to pay interest on the assets in his hands;[8] and a receiver who neglects to obey a direction to invest the rents and profits of the estate in his hands, must pay interest on the sums he has received.[9] The rate would, in this country, be 6 per cent, the Court rate of interest.[10]

It is no excuse that the executor has made no profit from the money in his hands; it is his duty to make it profitable for the estate, and he will be made to pay interest, though he has left the money in his banker's hands at a separate account.[11]

[1] Bovy *v.* Simth, 2 Ch Cas., 124; Kennedy *v* Daly, 1 Sch. and Lef., 379.
[2] Ratcliffe *v.* Graves, 1 Vern., 196. [3] See *ante*, p. 172.
[4] Forbes *v.* Ross, 2 Cox, 113; Johnson *v.* Newton, 11 Hare, 160.
[5] Forbes *v* Ross, 2 Cox, 113; Piety *v.* Stace, 4 Ves., 620; Tebbs *v.* Carpenter, 1 Madd., 290; Crackelt *v.* Bethune, 1 Jac. and W., 586; Hall *v.* Hallet, 1 Cox, 134; Holgate *v.* Haworth, 17 Beav., 259.
[6] Burdick *v.* Garrick, L. R., 5 Ch., 233.
[7] Hall *v.* Hallet, 1 Cox, 134; Tebbs *v.* Carpenter, 1 Madd., 303; Turner *v.* Turner, 1 J. and W., 43.
[8] Treves *v.* Townshend, 1 Bro. C. C. 384; Hankey *v.* Garrett, 1 Ves., 236.
[9] Hicks *v.* Hicks, 3 Atk., 274.
[10] As to when the rate of interest may be varied, see Lewin, 7th Edn., 313, 314.
[11] Ashburnham *v.* Thompson, 13 Ves., 402.

LECTURE X.

Liability of trustee who leaves property uninvested.

If a trustee whose duty it is to call in and invest the trust-property, improperly leaves it outstanding, and it is lost, he will be liable for the amount of the property, but not for interest.[1] In a case before the Privy Council,[2] *A* sued *B*, a debtor of his intestate, upon a bond-debt, and obtained a decree against him for the amount. *B* appealed to the Sudder Court. By a deed of arrangement entered into by *A* and *C* after the commencement of the suit, *C* became entitled to a six-anna share of the debt. Pending the appeal to the Sudder Court, *A* entered into a compromise with *B*, postponing the payment of the amount recovered by the decree for three years, and foregoing altogether interest upon the principal. This was done without the privity or consent of *C*. *B* failed to pay the amount within the stipulated time, and proceedings were taken by *A* against him, but he had not realized the amount of the decree. In a suit by *C* against *A* to make him chargeable for the six annas share in the decree, the Sudder Court held, that *A* was liable to *C* for such share with interest. On appeal, the Privy Council held, that *A* must be treated as a trustee for *C*, and that, in the absence of fraud upon the *cestui que trust* in executing the compromise, or that it was not beneficial for all parties, he was responsible only to *C* for such amount of the debt as had been recovered, or without his wilful default might have been recovered.

When trustee liable to pay interest.

Although a trustee is not liable for interest if he improperly leaves the trust-property outstanding, he will be liable to pay interest if he unnecessarily delay in investing the trust-property or in paying it over to a person entitled to receive, even though the plaint does not pray for interest; and[3] if there has been very great delay, may have to pay the costs.[4]

Trustee employing trust-funds in trade.

If a trustee mixes trust-funds with his own moneys, and employs the mixed fund in a trade or adventure of his own, the *cestui que trust* may, if he prefers it, insist upon charging the trustee with the principal and a proportionate

[1] Lowson *v.* Copeland, 2 Bro. C. C., 156; Tebbs *v.* Carpenter, 1 Madd., 290.

[2] Doorga Pershad Roy Chowdhry *v.* Tarra Persad Roy Chowdhry, 4 Moo. I. A., 452.

[3] Woodhead *v.* Marriott, C. P. Coop. Cas., 1837-38, p. 62; Turner *v.* Turner, 1 J. and W., 39; Hollingsworth *v.* Shakeshaft, 14 Beav., 492; Stafford *v.* Fiddon, 23 Beav., 386.

[4] Tickner *v.* Smith, 3 Sm. and Giff., 42.

share of the profits, instead of with the principal and interest only. He cannot claim both interest and profits in respect of the money employed in trade, but must elect between them.[1] The leading case on this point is *Docker v. Somes*,[2] and the principles upon which the Court acts were very clearly stated by Lord Brougham, L. C. His Lordship said: "Wherever a trustee, or one standing in the relation of a trustee, violates his duty, and deals with the trust-estate for his own behoof, the rule is, that he shall account to the *cestui que trust* for all the gain which he has made. Thus, if trust-money is laid out in buying and selling land, and a profit made by the transaction, that shall not go to the trustee who has so applied the money, but to the *cestui que trust* whose money has been thus applied. In like manner (and cases of this kind are more numerous) where a trustee or executor has used the fund committed to his care in stock speculations, though the loss, if any, must fall upon himself, yet, for every farthing of profit he may make, he shall be accountable to the trust-estate. So, if he lay out the trust-money in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person, from which he is to derive a certain stipulated profit, although I will not say that this has been decided, I hold it to be quite clear that he must account for the profits received by the adventure or from the concern. In all these cases it is easy to tell what the gains are; the fund is kept distinct from the trustee's other moneys, and whatever he gets he must account for and pay over. It is so much fruit—so much increase on the estate or chattel of another, and must follow the ownership of the property and go to the proprietor So it is also where one not expressly a trustee has bought or trafficked with another's money. The law raises a trust by implication, clothing him, though a stranger, with the fiduciary character for the purpose of making him accountable. If a person has purchased land in his own name with my money, there is a resulting trust for me; if he has invested my money in any other speculation without my consent, he is held a trustee for my benefit. And so an attorney, guardian, or other person standing in a like situation to another, gains not for himself, but for the client, infant, or other party whose confidence has been abused.

Docker v. Somes.

[1] Vyse v. Foster, L. R., 8 Ch., 334.

[2] 2 M. and K., 664.

LECTURE X.

"Such being the undeniable principle of equity—such the rule by which breach of trust is discouraged and punished—discouraged by intercepting its gains, and thus frustrating the intentions that caused it—punished by charging all losses on the wrong-doer, while no profit can ever accrue to him,—can the Court consistently draw the line, as the cases would seem to draw it, and except from the general rule those instances where the risk of the malversation is most imminent—those instances where the trustee is most likely to misappropriate,—namely, those in which he uses the trust-funds in his own traffic? At first sight this seems grossly absurd, and some reflection is required to understand how the Court could ever, even in appearance, tolerate such an anomaly. The reason which has induced Judges to be satisfied with allowing interest only, I take to have been this—they could not easily sever the profits attributable to the trust-money from those belonging to the whole capital stock; and the process became still more difficult, where a great proportion of the gains proceeded from skill or labour employed upon the capital. In case of separate appropriation there was no such difficulty; as where land or stock had been bought and then sold again at a profit; and here, accordingly, there was no hesitation in at once making the trustee account for the whole gains he had made. But where, having engaged in some trade himself, he had invested the trust-money in that trade along with his own, there was so much difficulty in severing the profits which might be supposed to come from the money misapplied from those which came from the rest of the capital embarked, that it was deemed more convenient to take another course, and instead of endeavouring to ascertain what profit had been really made, to fix upon certain rates of interest as the supposed measure or representative of the profits, and assign that to the trust-estate.

"This principle is, undoubtedly, attended with one advantage; it avoids the necessity of an investigation of more or less nicety in each individual case, and it thus attains one of the important benefits resulting from all general rules. But mark what sacrifices of justice and of expediency are made for this convenience. All trust-estates receive the same compensation, whatever risks they may have run during the period of their misappropriation; all profit equally, whatever may be the real gain derived by the trustee from his breach of duty; nor can any

amount of profit made be reached by the Court, or even the most moderate rate of merchantile profit, that is, the legal rate of profits, be exceeded, whatever the actual gains may have been, unless by the very clumsy and arbitrary method of allowing rests, in other words, compound interest; and this without regard to the profits actually realized; for, in the most remarkable case in which this method has been resorted to[1] (which, indeed, is always cited to be doubted, if not disapproved), the compound interest was given with a view to the culpability of the trustee's conduct, and not upon any estimate of the profits he had made by it.

"But the principal objection which I have to the rule is founded upon its tendency to cripple the just power of this Court in by far the most wholesome, and indeed necessary, exercise of its functions, and the encouragement thus held out to fraud and breach of trust. What avails it towards preventing such malversation, that the contrivers of sordid injustice feel the power of the Court only where they are clumsy enough to keep the gains of their dishonesty severed from the rest of their stores. It is in vain they are told of the Court's arm being long enough to reach them, and strong enough to hold them, if they know that a certain delicacy of touch is required without which the hand might as well be paralysed or shrunk up. The distinction, I will not say sanctioned, but pointed at, by the negative authority of the cases, proclaims to executors and trustees, that they have only to invest the trust-money in the speculations, and expose it to the hazards of their own commerce, and be charged five for cent on it; and then they may pocket fifteen or twenty per cent by a successful adventure. Surely the supposed difficulty of ascertaining the real gain made by the misapplication is as nothing compared with the mischiefs likely to arise from admitting this rule, or rather this exception to one of the most general rules of equitable jurisdiction."

Apportioning profits.

There is no rule for apportioning the profits according to the respective amounts of the capital, but the division will be affected by considerations of the source of the profit, the nature of the business, and the other circumstances of the case. It is obvious that it must be so; there are many cases in which the profit of a business has no ascertainable

[1] Raphael v. Boehm, 11 Ves., 92.

LECTURE X.

reference to the capital—*e.g.*, solicitors, factors, brokers, or bankers. Indeed, in almost every case where the business consists of buying and selling, the difference between prosperity and ruin mainly depends on the skill, industry, and care of the dealers; no doubt, also greatly on their credit and reputation and the possession of ready-money to take advantage of favourable opportunities and to enable them to bide their time in unfavourable states of the market, and also greatly on the established good-will and connection of the house.[1]

Compound interest.

If a trustee is expressly directed to invest the trust-funds, and to accumulate the income, and neglects the direction to accumulate, he may be charged with compound interest, although the principal fund may not have suffered any loss.

There must have been an express trust in order to charge the trustee with compound interest.[2] "Where there is an express trust to make improvement of the money," said Lord Eldon,[3] "if the trustee will not honestly endeavour to improve it, there is nothing wrong in considering him, as the principal, to have lent the money to himself upon the same terms upon which he could have lent it to others, and as often as he could have lent it if it be principal, and as often as he ought to have received it, and lent it to others, if the demand be interest, and interest upon interest."[4]

Trust-funds mixed with trustee's money.

If a trustee mixes trust-funds with his own money, the *cestui que trust* will be entitled to every portion of the mixed fund which the trustee cannot prove to be his own. The principle is, that if a man who undertakes to keep the property of another distinct, mixes it with his own, the whole must be taken to be the property of the other until the former puts the subject under such circumstances, that it may be distinguished as satisfactorily as it might have been before that unauthorized mixture upon his part.[5] Thus, where a commission agent mixed his goods with those of his principal, and destroyed his books of account, he was disallowed his commission.[6] "I take it,"

[1] Vyse *v.* Foster, L. R., 8 Ch., 331, *per* James, L. J.

[2] Tebbs *v.* Carpenter, 1 Madd., 290; Attorney-General *v.* Solly, 2 Sim., 518.

[3] Raphael *v.* Boehm, 11 Ves., 92, 107.

[4] See also Burdick *v.* Garrick, L. R., 5 Ch., 233.

[5] Lupton *v.* White, 15 Ves., 436, *per* Lord Eldon.

[6] Gray *v.* Haig, 20 Beav., 219.

said Shadwell, V.C., "that the general wisdom of mankind has acquiesced in this, that the author of a mischief is not the party who is to complain of the result of it, but that he who has done it must submit to have the effects of it recoil upon himself. This, I say, is a proposition which is supported by the Holy Scriptures, by the authority of profane writers, by the Roman Civil Law, by subsequent writers upon Civil Law, by the Common Law of this country, and by the decisions in our own Courts of Equity."[1]

The Contract Act[2] has altered the English law as regards the case of a bailee, without the consent of the bailor, mixing his goods with those of the bailor in such a manner that the different goods become undistinguishable. According to English law the bailor takes the whole of the goods.[3] The Contract Act, however, only entitles the bailor to compensation.

Partner trustee employing trust-funds in business.

If a partner, being a trustee, improperly employs trust-moneys in the business, or on the account of the partnership, no other partner is liable, therefor, to the *cestui que trust*, unless he either knew of the breach of trust, or with reasonable diligence might have known it. In either of the last-mentioned cases the partners having such knowledge or means of knowledge are jointly and severally liable for the breach of trust.

The mere fact that trust-funds have been employed in the business of a partnership is not enough to make the firm liable.[4] To make the firm liable, all the partners must have been implicated in the breach of trust. It would be manifestly unjust to make persons liable for a breach of trust of which they were wholly ignorant. If it can be imputed to the partners that they knew, or ought to have known, that trust-moneys were being employed in the partnership business, they will be held bound to see that the trust to which the money is subject authorizes the use of it, and will be answerable for a breach of trust in case of its misapplication or loss.[5]

[1] Duke of Leeds *v.* Earl of Amherst, 20 Beav., 242; and see Mason *v.* Morley, 34 Beav., 470; Cook *v.* Addison, L. R., 7 Eq., 466.

[2] Act IX of 1872, s. 157.

[3] See Lupton *v.* White, 15 Ves., 442.

[4] *Ex parte* Apsey, 3 Bro. C. C. 265; *Ex parte* Heaton, Buck, 386; *Ex parte* White, L. R., 6 Ch., 397

[5] Lindley on Partnership, 4th Ed., 312; see cases cited *n* (*u*).

LECTURE X.

Thus, where a trader appointed an executor, who subsequently entered into partnership with some other persons in the same trade, and employed the testator's assets in the partnership business, giving his partners an indemnity against any claim by the residuary legatees, it was held, that the persons who had entered into the partnership with the executor were jointly liable with him not as partners, but because they had knowingly become parties to the breach of trust.[1]

Election where trust-property to be sold or invested

Occasionally, a testator directs certain property intended to be the subject of trusts to be sold and invested, either in land or in securities for money. When this is done, the trust-property is impressed with the character of the investment directed;—that is to say, money, or securities for money, directed to be laid out in the purchase of land, or land directed to be sold and turned into money, will be considered as that species of property into which it is directed to be converted; the principle applied being that "what ought to have been done shall be taken as done."[2] And in the case of intestacy, such trust-property will descend as if it had been converted.

But when money has been directed to be converted into land or other security, or land has been directed to be converted into money, but the conversion has not in fact taken place until the whole beneficial interest, whether in land or money, has become vested absolutely in one *cestui que trust*, he may elect to take the property in its original character;[3] the Court will not direct the conversion to be carried into effect, because the *cestui que trust*, having the absolute beneficial interest, can, as we have seen, *ante*, p. 271, claim the property and could immediately re-convert it, and "equity like nature will do nothing in vain."[4]

The *cestui que trust* must be a person competent to contract,[5]

Election by one *cestui que trust* to retain property unconverted.

Where immoveable property is directed to be sold, and the proceeds are to be divided among several persons, no

[1] Flockton *v.* Bunning, L. R., 8 Ch., 323 (*n*); see also Vyse *v.* Foster, *ib.*, 309; on appeal, L. R., 7 H. L. C., 318.

[2] Lechmere *v.* The Earl of Carlisle, 3 P. Wms., 215.

[3] Cookson *v.* Cookson, 12 C. and F., 121.

[4] Seely *v.* Jago, 1 P. Wms., 389.

[5] As to who are competent to contract, see *ante*, p. 124. See also Seeley *v.* Jago, 1 P. Wms., 389; Ashby *v.* Palmer, 1 Mer., 301; Carr *v.* Ellison, 2 Bro. C. C., 56.

one of the *cestuis que trustent* can elect that his own undivided share shall not be sold. "It would," said Romilly, M. R., "be repugnant to the principles on which the doctrine of conversion and reconversion rests to hold, that one of the legatees of an undivided share in the produce of real estate directed by the testator to be converted into personalty could, without the assent of the others, elect to take his share as unconverted, and in the shape of real estate."[1]

The reason is, that a portion of the property would not sell as beneficially as the entire estate.[2] If, however, money is devised to be laid out in the purchase of lands to be settled on several persons, any one of them may elect to take his own share in money, for a portion of the money can be invested as advantageously as the whole sum.[3]

Notification of election.

When a *cestui que trust* elects to take the trust-property unconverted, he may notify his election either by express declaration, which may be by parol,[4] or by his acts. Very slight circumstances are sufficient to show that the *cestui que trust* has elected to take the property in its original character.[5] For instance, if the *cestui que trust* takes money directed to be laid out in land, from the trustee,[6] or enters into possession of land directed to be converted into money,[7] and takes the title-deeds into his own custody, for without them the trustees cannot sell,[8] or mortgages the property,[9] he will be considered to have elected to take the property unconverted. So the presumption will be the same if he keeps the land for a long time unsold.[10]

But the receipt of the income arising from money directed to be laid out in land, is not evidence of an election to take the money unconverted.[11]

[1] Holloway *v.* Radcliffe, 23 Beav., 172.
[2] Chalmer *v.* Bradley, 1 J. & W., 59.
[3] Seeley *v.* Jago, 1 P. Wms., 389.
[4] Crabtree *v.* Bramble, 3 Atk., 685, citing Chaloner *v.* Butcher; Pultney *v.* Darlington, 1 Bro. C. C., 237; Wheldale *v.* Partridge, 8 Ves., 236.
[5] Pultney *v.* Darlington, 1 Bro. C. C., 238; Van *v.* Barnett, 19 Ves., 109; Dixon *v.* Gayfere, 17 Beav., 434.
[6] Pultney *v.* Darlington, 1 Bro. C. C., 238; Trafford *v.* Boehm, 3 Atk., 440; Rook *v.* Warth, 1 Ves., 461.
[7] Dixon *v.* Gayfere, 17 Beav., 433.
[8] Davies *v.* Ashford, 15 Sim., 42.
[9] Padbury *v.* Clark, 2 Mac. & G., 298.
[10] Ashby *v.* Palmer, 1 Mer., 301; Dixon *v.* Gayfere, 17 Beav., 433; Griesbach *v.* Fremantle, *ib.*, 314; Roberts *v.* Gordon, L. R., 6 C. D., 531.
[11] Gillies *v.* Longlands, 4 DeG. & Sm., 372; *Re* Pedder's Settlement, 5 D. M. G., 890.

LECTURE X.

It is not necessary that the *cestui que trust* should intend to elect, it is sufficient if he shows an intention to deal with the trust-property in its natural character. "It was argued," said Kindersley, V. C., "that there must be an intention strictly to convert,—that is to say, that, knowing that the money was impressed with the character of land, the party must say, 'I mean that it shall no longer be land, but it shall be in its actual form of money.' I do not, however, think that is the correct view of the law. It is quite sufficient if the Court sees that the party means it to be taken in the state in which it actually is, whether he did or did not know that but for some election by him it would be turned into land is quite immaterial. If, being money, the party absolutely entitled indicated that he wished to deal with it as money, and that it should be considered as money, whether he knew or did not know that but for that wish it would have gone as land, appears to me wholly immaterial."[1]

Liability of *cestui que trust* joining in breach of trust.

If one of several *cestuis que trustent* joins with the trustee in committing a breach of trust, and a loss to the trust-estate is incurred, the other *cestuis que trustent* are entitled to have the whole of his interest in the trust-estate stopped and accumulated in the hands of the trustees until the loss has been repaired. "Nothing," said Lord Langdale,[2] "can be more clear than the rule which is adopted by the Court in these cases, that if one party having a partial interest in the trust-fund induces the trustee to depart from the direction of the trust for his own benefit, and enjoys that benefit, he shall not be permitted personally to enjoy the benefit of the trust, whilst the trustees are subjected to a serious liability which he has brought upon them. What the Court does in such a case is, to lay hold of the partial interest to which that person is entitled, and apply it, so far as it will extend, in exoneration of the trustees, who, by his request and desire, or acquiescence, or by any other mode of concurrence, have been induced to do the improper act."[3]

In *Raby* v. *Ridehalgh*[4] Turner, L. J. said: —"The

[1] Harcourt *v.* Seymour, 2 Sim. (N. S.), 46; see further as to conversion and election, Lewin, 7th Edn., 801—823.

[2] Lincoln *v.* Wright. 4 Beav., 432.

[3] See also *Ex parte* Mitford, 1 Bro. C. C., 398; Woodyatt *v.* Gresley, 8 Sim., 180; Priddy v. Rose, 3 Mer., 86, 105; M'Gachen *v.* Dew, 15 Beav., 84; Vaughton *v.* Noble, 30 Beav., 34; Walsham *v.* Stainton, 1 H & M., 337; Jacubs v. Rylance, L. R., 17 Eq., 341.

[4] 7 D. M. G., 109

trustees, then, being liable to replace those trust-funds, the next question is, what is the extent of the liability which attaches upon the *cestuis que trustent* for life in consequence of their having induced the trustees to commit the breach of trust? Now the *cestuis que trustent* for life, who instigated the trustees to commit the breach of trust, have derived from that breach of trust the advantage of enjoying the increased income of the fund not duly invested according to the trust, and the consequence of that is, that the *cestuis que trustent* in remainder have a right to have that income refunded and made good by the *cestuis que trustent* for life. It is trust-money received by them under a breach of trust to which they were privy, and the effect, I apprehend, must be, that as the loss which ought to fall on those who instigated the breach of trust has been laid by the Court upon the trustees, the trustees are entitled to stand in the place of the *cestuis que trustent* in remainder, for the purpose of recovering, against the *cestuis que trustent* for life who instigated the breach of trust, or their estates, the benefit actually received by them in consequence of such breach of trust. It seems to me to be the necessary consequence of the *cestuis que trustent* for life having received the income of the trust-fund unduly invested, that the trustees have a right to be indemnified as against the *cestuis que trustent* for life or their estates, to the extent which those estates have been benefited by the improper investment."

Against whom interest of *cestui que trust* applied.

The interest of the *cestui que trust*, who concurs in the breach of trust, will be applied to make good the loss to the trust-fund, as against his assignee in insolvency,[1] judgment-creditors,[2] or general creditors,[3] and as against any persons deriving title through him, except in the case of purchasers for valuable consideration without notice of the breach of trust.[4] And the rule that we are now considering applies to property settled upon a married woman for her separate use, for a married woman acting with respect to her separate property is competent to act in all respects as if she were unmarried.[5] But it does not apply

[1] *Ex parte* King, 2 M. & A., 410; Smith *v.* Smith, 1 Y. & C., Ex., 338; Burridge *v.* Row, 1 Y. & C. C. C., 183, 583.

[2] Lewin, 7th Edn., 778, citing Kilworth *v.* Mountcashell, 15 Ir. Ch. Rep., 565. [3] Williams *v.* Allen, 32 Beav., 650.

[4] Woodyatt *v.* Gresley, 8 Sim., 180; Priddy *v.* Rose, 3 Mer., 86; Cole *v.* Muddle, 10 Hare, 186; Morris *v.* Livie, 1 Y. & C. C. C., 380.

[5] Hulme *v.* Tennant, 1 Bro. C. C., 20.

LECTURE X.

if the property is settled upon the married woman for her separate use without power of anticipation.[1]

Rights and liabilities of transferee from *cestui que trust.*

We have seen[2] that a *cestui que trust* may transfer his interest in the trust-fund. The transferree will be bound by all the equities affecting the trust-fund when transferred, whether he had notice of the equities or not.

For instance, a person taking an equitable mortgage, with notice of a prior equitable mortgage, cannot, by assignment to another without notice, give him a better title than he has himself.[3] So, where *A* obtained a mortgage of real and personal estate from *B* without consideration, and it was afterwards deposited with *C* as a security, *C* having no notice of the circumstances under which it had been obtained,—it was held, that *C* could stand in no better position than *A*, and that the deed being void as against *A*, was equally void as against *C*.[4]

If a trustee has a beneficial interest in the trust-estate, and owes money to it, and assigns his interest to a stranger, the assignee is bound to discharge the debt owing to the trust-estate by the trustee before he can take anything under the assignment; and this whether the original debt was contracted before, or after the assignment.[5] Thus, where a testatrix bequeathed a leasehold estate to trustees and executors in trust for sale, and gave one of the executors a beneficial interest for his life in one-fourth part of the estate, and the executor being at that time indebted to the estate of the testatrix, made an assignment of his beneficial interest by way of mortgage to secure a private debt which he owed to a creditor, and deposited the title-deeds with the creditor,—it was held, in a suit by the co-executors to recover the title-deeds, that the estate of the testatrix was entitled to a lien on the interest of the defaulting executor in the premises comprised in the deeds, in priority to the lien created by his assignment to the mortgagee; and the Court decreed the title-deeds to be delivered up, with a declaration that they belonged to the three trustees.[6]

[1] Grigby *v.* Cox, 1 Ves., 518. Married women subject to the Succession Act may deal with their property as if unmarried, see Act X of 1865, s. 4.
[2] *Ante*, p. 271. [3] Ford *v.* White, 16 Beav., 120.
[4] Parker *v.* Clarke, 30 Beav, 54.
[5] Morris *v.* Livie, 1 Y. & C. C. C., 380.
[6] Cole *v.* Muddle, 10 Hare, 186; and see Barnett *v.* Sheffield, 1 D. M. G., 371; Clack *v.* Holland, 19 Beav., 262; Wilkins *v.* Sibley, 4 Giff., 442.

And the rule is the same if the assignment is made by a *cestui que trust.*[1]

If the assignor did not acquire his fiduciary position until after the assignment, there will be no equity against the assignee in respect of a subsequently incurred debt.[2]

A trustee or executor, when he receives notice that a legatee has charged his legacy, is bound to withhold all further payments to that legatee. All rights of set-off and adjustment of equities between the legatee and the executor existing at the date of the notice have priority over the charge, but the trustees can create no new charges or rights of set-off after that time.[3]

[1] Priddy *v.* Rose, 3 Mer., 86; Willes *v.* Greenhill, 29 Beav., 376; Stephens *v.* Venables, 30 Beav., 625.

[2] Irby *v.* Irby, 25 Beav., 632.

[3] Stephens *v.* Venables, 30 Beav., 625. See further as to the rights of assignees and set-off, Lewin, 7th Edn., 596.

LECTURE XI.

VACATING THE OFFICE OF TRUSTEE.

Vacating the office of trustee — Discharge by *cestuis que trustent* — Discharge under power in instrument — Number of trustees — Trustee dying in lifetime of settlor — Payment into Court — Refusing or declining — Retiring — Last survivor — *Cestui que trust* may be appointed — Assignee or devisee of trustee becoming unfit or incapable — New trustee should be within jurisdiction — Trustee paid to retire — Breach of trust — Appointment must be completed — Stamp — Discharge by Court — Grounds of discharge — Whether retiring trustee must appoint successor — Must be by suit — Affidavits of fitness — Official Trustee's Act, s. 10 — Appointment where property lost — Costs — Grounds for discharge — Discharge of representatives of trustee — Executor — Trustees' and Mortgagees' Powers Act, s. 34 — Conveyance to new trustee — Survival of trust — Extinction of trust — Compulsory payment into Court — Nature of interest of plaintiff — Payment in of share — Payment after decrees — Payment in of fund not received — Admission of receipt of money by trustee — Appointment of receiver — Necessary parties to a suit — Suits by or against strangers — Civil Procedure Code — Succession Act, s. 187 — Suits for specific performance — Representative specially constituted — Suits between trustees and *cestuis que trustent* — Representatives of deceased trustee — When trustee unnecessary party — *Cestui que trust* abroad — Suit for aliquot share — Suit between trustees — Executors and administrators — Suit by one *cestui que trust* on behalf of others — When allowable — Severing defence — Costs of severing — Costs — In suits between stranger as parties to trust — Between trustees and *cestuis que trustent* — Costs out of fund — Costs, charges, and expenses — Disclaimer — Costs after decree — Suit necessary by act of trustee — Accounts — Law doubtful.

Vacating the office of trustee.

AFTER a trustee has accepted the office, he cannot by any act of his own, without communication with his *cestui que trust*, denude himself of the character of trustee until he has performed his trust.[1] "The only modes," says Mr. Lewin,[2] "by which a trustee can divest himself of the character of trustee are the following:—*First*, he may have the universal consent of all the parties interested; *secondly*, he may retire by virtue of a special power contained in the instrument creating the trust; or, *thirdly*, he may obtain his release by application to the Court."

[1] Chalmer *v.* Bradley, 1 J. & W., 68.

[2] Lewin, 7th Edn., 553.

Discharge by *cestuis que trustent.*

A trustee can only be effectually discharged by the *cestuis que trustent* if they are all competent to contract, and therefore if any of the *cestuis que trustent* are infants, no discharge by those who are of age, will prevent the trustee from being liable to the infants;[1] and the rule will be the same whatever the disability of the *cestui que trust* may be. All the *cestuis que trustent* must concur in the discharge; a discharge by the majority will not be effectual.[2]

If the parties interested in the trust-funds be not all in existence, as where the limitation of the property is to children unborn, it is clear that as the trustee cannot have the sanction of all the parties interested, he cannot with safety be discharged from the trust.[3]

Discharge under power in instrument.

In the second case, as the person who creates the trust may mould it in whatever form he pleases, he may provide that, on the occurrence of certain events, and the fulfilment of certain conditions, the original trustee may retire and a new trustee be appointed. The form of power most commonly in use in instruments drawn according to English precedents is, that, in case the trustees appointed by the instrument of trust, or to be appointed under the power, or any of them shall "die, or be abroad for twelve calendar months, or be desirous of being discharged from, or refuse, decline, or become incapable to act in the trusts," it shall be lawful for the *cestui que trust* to whom the power may be given, or (as the proviso is frequently worded) for the surviving or continuing trustee, or the executors or administrators of the survivor, by deed or writing, to nominate some other person to be a trustee. The best forms provide that a refusing or retiring trustee shall, if willing to execute the power, be deemed to be a continuing trustee. Sometimes the power is given to the surviving, continuing, or other trustee—an addition which has been found useful in practice.[4] The power then proceeds to declare that the trust-estate shall forthwith be vested jointly in the persons who are in future to compose the body of trustees; and that the new or substituted trustee shall, either before or after the trust-estate shall

[1] Wilkinson *v.* Parry, 4 Russ., 276.
[2] *Ex parte* Hughes, 6 Ves., 622; *Ex parte* Lacey, *ib.*, 628.
[3] Lewin, 7th Edn., 553.
[4] Lord Camoys *v.* Best, 19 Beav., 414.

LECTURE XI.

have been so vested, be capable of exercising all the same powers as if he had been originally named in the settlement.[1]

Number of trustees.

The question often arises, whether on the appointment of new trustees it is necessary to adhere to the original number. The result of the authorities seems to be, that it is not, unless such an intention can be gathered from the particular language of the instrument. Thus, appointments of two in the place of three or four, and of three in the place of four or five, have been upheld;[2] but it would not be safe for the survivor of several trustees to retire and appoint one new trustee only;[3] and an increase of the numbers has, in some cases, been allowed.[4]

Trustee dying in lifetime of settlor.

Payment into Court.

A power to a surviving or continuing trustee to appoint a new trustee in the place of a trustee dying, will apply to the case of a person dying in the lifetime of the author of the trust.[5] And it has been held, that the payment into Court of the trust-fund by the trustee is a retiring of such trustee from the trust, and authorizes the appointment of a new trustee in his place under a power for that purpose, to arise in the event of a trustee refusing or declining to act.[6]

Refusing or declining.

There seems no reasonable doubt that the words "refusing or declining" would apply to the case of a trustee once acting and then retiring or declining further to act.[7]

Retiring.

A retiring trustee cannot appoint a new trustee under a power for this purpose given to a surviving or continuing trustee.[8]

Last survivor.

But where there was a power for the surviving or continuing or other trustee or trustees, to appoint new trustees in the place of a trustee or trustees dying or desiring to be discharged, or refusing or declining to act, it was held, that

[1] Lewin, 7th Edn., 554.

[2] *In re* Fagg's Trust. 19 L. J., Ch, 175; *In re* Bathurst's Estate, 2 Sm. & Giff., 172; Miller *v.* Priddon, 1 D. M. G., 335; Emmet *v.* Clarke, 3 Giff., 32; Reid *v.* Reid, 30 Beav., 388.

[3] Hulme *v.* Hulme, 2 M. & K., 682; *Ex parte* Davis, 2 Y. & C. C. C., 468.

[4] D'Almaine *v.* Anderson, cited Lewin, 7th Edn., 564; Meinertzhagen *v.* Davis, 1 Coll., 335; Sands *v.* Nugee, 8 Sim., 130.

[5] *Ex parte* Hadley, 5 DeG. & Sm., 67; Nicholson *v.* Wright, 26 L. J. Ch., 312; Noble *v.* Meymott, 14 Beav., 477.

[6] *In re* Williams's Settlement, 4 K. & J., 87.

[7] Lewin, 7th Edn., 561; Travis *v.* Illingworth, 2 Dr. & Sm., 346.

[8] Stones *v.* Rowton, 17 Beav., 308; Nicholson *v.* Smith, 3 Jur., N. S., 313; Earl of Lonsdale *v.* Beckett, 4 DeG. & S., 73; Travis *v.* Illingworth, 2 Dr. & Sm., 344; Sharp *v.* Sharp, 2 B. & Ald., 415.

an appointment of four new trustees by the last survivor of four trustees who was desirous of being discharged was good.[1]

If, therefore, the power of appointing new trustees in the place of trustees desiring to be discharged, &c., is limited to the surviving or continuing trustees or trustee, and both the trustees for the time being wish to retire, the following course should be adopted:—One of the two trustees should first retire, and a new trustee be appointed in his place by the other as the continuing trustee. The other trustee should then retire, and the newly-appointed trustee under the first appointment should, as the then continuing trustee, appoint a trustee in the place of the last retiring trustee.

If there is only one surviving trustee, and he wishes to retire, he should first appoint a new trustee in the place of the deceased trustee, and then the newly-appointed trustee should appoint a second trustee in the place of the retiring trustee.[2]

Cestui que trust may be appointed.

A person beneficially interested, and even the tenant-for-life under the trust-deed, may be appointed a new trustee, unless the instrument shows an intention to the contrary.[3]

Assignee or devisee of trustee.

The rules which relate to powers generally must be observed in reference to a power for the appointment of new trustees; and such a power can only be exercised by the person to whom it is expressly given by the instrument; so that the assignee or devisee of a surviving or continuing trustee cannot appoint new trustees under a power limited to the surviving or continuing trustee, his executors or administrators only; and if the power is only to be exercised with consent, the power would be extinguished by the death of the consenting party.[4]

So also if a tenant-for-life, in whom a power to appoint new trustees is vested, aliens or mortgages his life-estate, the power cannot afterwards be exercised without the consent of the alienee or mortgagee, unless the right to do so is expressly reserved.[5]

Becoming unfit or incapable.

A power to appoint a new trustee in the place of a person 'becoming unfit' to act, applies to the case of a person becoming insolvent.[6] But insolvency is not a ground for

[1] Lord Camoys *v.* Best, 19 Beav., 414.
[2] 2 Prid. Convey., 9th Edn., 143.
[3] Forster *v.* Abraham, L. R., 17 Eq., 351.
[4] 2 Prid. Convey., 9th Edn., 143.
[5] Lewin, Ch. XXII.
[6] *In re* Roche, 2 Dr. and War., 287.

LECTURE XI.

an appointment under a power to appoint a new trustee in the place of a trustee 'becoming incapable' to act. It is, however, a sufficient ground for his removal from the office by the Court.[1] A trustee who goes to reside abroad does not 'become incapable' to act.[2]

New trustee should be within jurisdiction.

The new trustees should be persons within the jurisdiction of the Court. Where, however, property in the English funds was settled upon a lady on her marriage with an American, and she went to reside with her husband in America, the subsequent appointment of three American trustees, though not expressly authorized by the settlement, was held to be valid.[3]

But where the Court is applied to, to appoint new trustees, it will not, as a rule, do so, if the proposed new trustees reside without the jurisdiction.[4]

Trustee paid to retire.

An appointment of a new trustee in consideration of a sum of money paid to the appointor is bad;[5] and so is the appointment of a trustee for the purpose of committing a breach of trust. In such a case the retiring trustee will remain liable.[6]

Breach of trust.

Appointment must be completed.

The retiring trustee must be careful not to part with the trust-fund until he is convinced that his successor has been properly appointed, for if the appointment of the new trustee is bad, and any breach of trust has been committed, the retiring trustee will remain liable.[7] And he must see that the circumstances under which he retires are those contemplated by the settlor.[8]

Stamp.

The stamp-duty upon the transfer of trust-property from one trustee to another without consideration is Rs. 5.[9]

Discharge by Court.

We now have to consider the discharge of a trustee by the Court. Upon this Mr. Lewin says:[10] "The trustee may, in every proper case, although the contrary appears to have been at one time supposed,[11] get himself discharged from

[1] Bainbrigge *v.* Blair, 1 Beav., 495.
[2] Withington *v.* Withington, 16 Sim., 104; *Re* Watt's Settlement, 9 Hare. 106.
[3] Meinertzhagen *v.* Davis, 1 Coll., 335.
[4] *In re* Guibert's Trust, 16 Jur., 852.
[5] Sugden *v.* Crossland, 3 Sm. and G., 192.
[6] Palairet *v.* Carew, 32 Beav., 567.
[7] Pearce *v.* Pearce, 22 Beav., 248.
[8] Lewin, 7th Edn., 559 See further as to appointment of new trustees under powers, Lewin, 7th Ed., 553—572.
[9] Act I of 1879, sched. i, art. 60.
[10] 7th Edn., 572. [11] Hamilton *v.* Fry, 2 Moll., 458.

the office by the substitution of a new trustee in his place on application to the Court. A power of appointment of new trustees is very frequently omitted in settlements (and wills), or the donee of the power either cannot or will not exercise it, and were there no means by which a trustee could ever denude himself of that character, it would operate as a great discouragement to mankind to undertake so arduous a task."

Grounds of discharge.

A trustee who has accepted the trust will not be permitted, voluntarily, from mere caprice or other trivial cause, to throw it up at the expense of his *cestui que trust.* The Court must come to a conclusion in each case, whether the conduct of the trustee in the particular instance falls within the rule.[1]

Whether retiring trustee must appoint successor.

It is usual for the trustee who seeks to be discharged by the Court to name some person as his successor, subject to the approval of the Court. It is not, however, necessary that he should do so, and in some cases he may be unable to find any person willing to undertake the trust. "It is quite a mistake," said Lord St. Leonards, "to suppose that a trustee, who is entitled to be discharged from his trust, is bound to show to the Court that there is some other person ready to accept the trust. The Court refers it to the Master to appoint a new trustee; but if no person will accept the trust, it may find itself obliged to keep the trustee before the Court, and not discharge him. The Court, will, however, take care that the trustee shall not suffer thereby."[2] It is doubtful whether a trustee who has accepted the trust, and committed no breach of trust, can get discharged by the Court, if no other fit person can be found to act and the *cestui que trust* will not consent to his discharge.[3] His only course under such circumstances is to apply to have the trusts executed by the Court.[4]

Must be by suit.

The application to be discharged must be by suit.[5] If, however, a suit relating to the trust-estate is pending, the trustee may move in the suit for his discharge.[6] The application for the appointment must be supported by affidavits

Affidavits of fitness,

[1] Courtenay *v.* Courtenay, 3 J. and Lat., 533; Forshaw *v.* Higginson, 20 Beav., 487.

[2] Courtenay *v.* Courtenay, 3 J. and Lat., 533.

[3] Ardill *v.* Savage, 1 Ir. Eq., 79, cited Lewin, 7th Edn., 573.

[4] Forshaw *v.* Higginson, 20 Beav., 485; Gardiner *v.* Downes, 22 Beav., 397; see *In re* Stokes's Trusts, L. R., 13 Eq., 333.

[5] *Ex parte* Anderson, 5 Ves., 243; *In re* Fitzgerald, Ll. and G., 22; *In re* Anderson, *ib.*, 29; Barry *v.* Steel, 1 Calc., 80.

[6] ——— *v.* Osborne, 6 Ves., 455; ——— *v.* Robarts, 1 Jac. and W., 251.

LECTURE XI.

as to the fitness of the person proposed. If no one is proposed, or if the Court is dissatisfied with the affidavits, a reference will be directed to ascertain who is a fit and proper person to act.

Official Trustee's Act, s. 10.

The Official Trustee's Act[1] provides, that "if any property is subject to a trust, whether for a charitable purpose or otherwise, and there shall be no trustee willing to act, or capable of acting, in the trusts thereof, who is within the local limits of the ordinary or extraordinary jurisdiction of the High Court (High Court means the High Courts of Judicature at Fort William in Bengal, Fort St. George, and Bombay respectively in the exercise of their original civil jurisdiction, Act XVII of 1864, s. 1), or if property is subject to a trust, and all the trustees or the surviving or continuing trustee, and all the persons beneficially interested in the said trust, shall be desirous that the Official Trustee shall be appointed in the room of such trustees or trustee, then, and in any such case it shall be lawful for the High Court on petition, and with the consent of the Official Trustee, to appoint the Official Trustee to be the trustee of such property; and, upon such appointment, such property shall vest in the Official Trustee and his successors in office, and shall be held by him and them, upon the same trusts as the same were held previous to such appointment." The Act provides,[2] that no trust for any religious purpose shall ever be held by the Official Trustee.

Appointment where property lost.

In a suit to appoint new trustees of a settlement, where a part of the trust-property had been lost by previous negligence or breach of trust, the Court refused to confine the trust to the remaining property; but appointed the new trustees to be trustees of the whole of the property comprised in the settlement, directing, for the protection of the new trustees, a reference to inquire whether it would be proper to take proceedings for the recovery of the property which had been lost.[3]

Costs.

A trustee has a right to be discharged, but if he retires without good grounds, or from caprice, he will have to bear the costs of the suit.[4] In all other cases he will be entitled to his costs out of the fund.[5]

[1] XVII of 1864, s. 10. [2] Sec. 8. [3] Bennett *v.* Burgis, 5 Hare, 295.
[4] Howard *v.* Rhodes, 1 Keen, 581; Porter *v.* Watts, 16 Jur., 757; Forshaw *v.* Higginson, 20 Beav., 485.
[5] Greenwood *v.* Wakeford, 1 Beav., 581; Forshaw *v.* Higginson, 20 Beav., 485; Courtenay *v.* Courtenay, 3 J. and Lat., 529; Gardiner *v.* Downes, 22 Beav., 395.

Grounds for discharge.

If the trustee finds the trust-estate involved in intricate and complicated questions, which were not, and could not have been, in contemplation at the time when the trust was undertaken, he has, in consequence of that change of circumstances, a right to come to the Court to be relieved; and the Court will judge whether the circumstances were such as to make it fair for him to decline acting longer on his own responsibility.[1]

Where the trustees of a marriage settlement, being desirous of retiring from the trusts in consequence of the responsibility to which they were exposed by the acts of the tenant-for-life, in repeatedly charging the trust-estates and funds with annuities and other incumbrances, instituted a suit to be discharged from the trusts, and for the appointment of new trustees under the direction of the Court, the relief sought was granted, and the costs were ordered to be paid out of the interest of the tenant-for-life.[2]

Discharge of representatives of trustee.

The trust-estate, upon the death of a sole trusee, or of the sole surviving trustee, descends upon his representatives. If they wish to be discharged, they must also apply to the Court; but there is this difference that they cannot be charged with caprice for declining to act.[3]

Executor.

An executor is regarded in some sense as a trustee, but he cannot, like a trustee, be discharged even by the Court from his executorship. However, when the funeral and testamentary expenses, debts, and legacies have been satisfied, and the surplus has been invested upon the trusts of the will, the executor then drops that character and becomes a trustee in the proper sense, and may then be discharged from the office like any other trustee.[4]

Trustee's and Mortgagee's Powers Act, s. 34.

Cases to which English law is applicable are governed by Act XXVIII of 1866. Section 34 of that Act provides, that "whenever any trustee, either original or substituted, and whether appointed by any High Court or otherwise, shall die, or be six months absent from British India, or desire to be discharged from, or refuse, or become unfit or incapable to act in the trusts or powers in him

[1] Greenwood *v.* Wakeford, 1 Beav., 581; Barker *v.* Peile, 2 Dr. and Sm., 340.

[2] Coventry *v.* Coventry, 1 Keen, 758.

[3] Greenwood *v.* Wakeford, 1 Beav., 582; Aldridge *v.* Westbrook, 4 Beav., 212; Legg *v.* Mackrell, 2 DeG. & J., 551.

[4] Lewin, 7th Edn., 575.

LECTURE XI.

reposed, before the same shall have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will, or other instrument creating the trust (if any), or if there be no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor, or administrators or administrator of the last surviving and continuing trustee, or for the retiring trustees, if they shall all retire simultaneously, or for the last retiring trustee, or where there are two or more classes of trustees of the instrument creating the trust, then for the surviving or continuing trustees or trustee of the class in which any such vacancy or disqualification shall occur (and for this purpose any refusing or retiring trustee shall, if willing to act in the execution of the power, be considered a continuing trustee) by writing to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or being absent from British India, or desiring to be discharged, or refusing or becoming unfit or incapable to act as aforesaid. So often as any new trustee or trustees shall be so appointed as aforesaid, all the trust-property (if any) which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors, or administrators of any trustee, shall, with all convenient speed, be conveyed and transferred, so that the same may be legally and effectually vested in such new trustee or trustees, either solely or jointly with the surviving or continuing trustees or trustee as the case may require. Every new trustee to be appointed as aforesaid, as well before as after such conveyance or transfer as aforesaid, and also every trustee appointed by any High Court either before or after the passing of this Act, shall have the same powers, authorities, and discretions, and shall in all respects act as if he had been originally nominated a trustee by the deed, will, or other instrument (if any) creating the trust. The Official Trustee may, with his consent, and by the order of the High Court, be appointed under this section in any case in which only one trustee is to be appointed, and such trustee is to be the sole trustee."

Conveyance to new trustee.

Upon the appointment of a new trustee, the trust-property must be conveyed to him. If the trustee is appointed by the Court, and there is no person to convey, the Court

will order the trust-estate to be vested in the trustee.[1] In the case of a charitable endowment by a Hindu, if the succession to the office of trustee wholly fails, the right of management reverts to the heirs of the founder.[2]

Survival of trust.

Trustees take the trust-estate as joint tenants, and therefore, on the death of one, the estate, office, and power survive to his co-trustees or trustee.[3] A bare authority committed to several persons is determined by the death of any one, but if coupled with an interest, it passes to the survivors.[4] And this right by survivorship will not be affected, merely because there is a power of appointing new trustees in place of those ceasing to be trustees,[5] unless the instrument creating the trust specially manifests such intention.[6] Where an Act of Parliament declared that the survivors should, and they were thereby required to appoint new trustees, it was said, that the proviso was analogous to the common one in settlements, and that the clause was not imperative, but merely of a directory character.[7]

So also an executorship or administratorship or testamentary guardianship survives.[8]

Extinction of trust.

A trust is extinguished when the purposes for which it was created have been completely fulfilled. For instance, if property is given to trustees on trust to apply the income towards the maintenance and education of the children of *A*, and upon the youngest attaining a certain age, upon further trust to distribute the principal among the children in certain proportions, the trust is extinguished when the youngest child has attained the age mentioned, and the fund has been distributed. And the trust will be extinguished if, owing to the property having been lost or destroyed, there is nothing left to apply towards the purposes of the trust.[9]

[1] See 2 Madd. Ch. Practice, pp. 161—201. As to the inherent power of the Court to appoint trustees, see Dodkin *v.* Brunt, L. R., 6 Eq., 580.

[2] M. S. Jai Bansi Kunwar *v.* Chattar Dari, 5 B. L. R., 181; see as to vesting the trust-estate in a new trustee, Lewin, 7th Edn., 557; and as to vesting in cases to which English law is applicable in India, see Act XXVII of 1866, *post*, Appendix.

[3] Lane *v.* Debenham, 11 Hare, 188; Watson *v.* Pearson, 2 Ex., 581.

[4] Eyre *v.* Countess of Shaftesbury, 2 P. Wms., 108.

[5] Warburton *v.* Sandys, 14 Sim., 622.

[6] Foley *v.* Wontner, 2 J. and W., 245; Jacob *v.* Lucas, 1 Beav., 436.

[7] *Doe v.* Godwin, 1 D. and R., 259.

[8] See Lewin, 7th Edn., 239.

[9] Frith *v.* Cartland, 34 L. J., Ch., 301.

LECTURE XI.

When a man, previously to going through the ceremony of marriage with his deceased wife's sister, executed a settlement reciting the intended marriage, by which certain property was assigned to trustees in trust for the settlor until the solemnization of the marriage; and after the solemnization thereof and after the decease of the settlor, to pay the interest to the intended wife for life, and then for the benefit of his two children by his former wife, and such children as he should have by his intended marriage; but if there should be no such child or children, then for the settlor, his executors, administrators, and assigns, it was held, that as no valid marriage could take place between the settlor and his deceased wife's sister, the trust in favour of himself until the solemnization of such marriage continued, and the subsequent trusts never having arisen, the property remained in him and formed part of his general estate.[1]

And a trust ceases when it is revoked.[2]

Compulsory payment into Court.

In certain cases a *cestui que trust* has the right to have the trust-fund paid into Court. The general rule is, that the plaintiffs must be solely entitled to the fund, or have acquired in the whole of the fund such an interest, together with others, as entitles them, on their own behalf and the behalf of those others, to have the fund secured in Court;[3] and apparently the order is a matter of course.[4] If a plaintiff claims to be entitled in a particular character to a fund in the hands of a trustee, and the trustee, by his answer says, he does not know whether the plaintiff fills that character or not, the plaintiff cannot have the fund brought into Court in the suit.[5] The money may be ordered to be paid in on the application of a party having a mere contingent interest in the fund,[6] even though all the parties having vested interests are satisfied with the conduct and custody of the trustees, and are opposed to the application.[7] All the persons having an interest in the fund ought, as a rule, to be before the Court;[8] but this is

[1] Pawson *v.* Brown, L. R., 13 Ch. Div., 202.
[2] See as to revocable trusts, *ante*, pp. 68-76.
[3] Freeman *v.* Fairlie, 3 Mer., 29. [4] Lewin, 7th Edn., 841.
[5] Dubless *v.* Flint, 4 M. and C., 502; and see M'Hardy *v.* Hitchcock, 11 Beav., 77.
[6] Bartlett *v.* Bartlett, 4 Hare, 631; Ross *v.* Ross, 12 Beav., 89.
[7] Bartlett *v.* Bartlett, 4 Hare, 631.
[8] Whitmarsh *v.* Robertson, 4 Beav., 26; Bartlett *v.* Bartlett, 4 Hare, 631.

not absolutely necessary.[1] The application for payment is made by motion, and if some of the persons interested are not necessary parties to the suit, it is not requisite to serve them with notice of the motion.[2] But where all the *cestuis que trustent* were served with the copy of a bill for the appointment of new trustees and transfer to them of the trust-fund, there being nothing asked in the bill as to the transfer of the fund into Court, it was held, that all the *cestuis que trustent* must be served with notice of motion to transfer the fund into Court, as there was nothing in the bill to indicate that it was intended so to deal with the trust-fund.[3]

Nature of interest of plaintiff.

Where the plaintiff in a suit seeking solely the payment into Court of a fund for the relief of poor Armenian orphans had no interest except as a member of the Armenian community, the suit was dismissed, although the trustees consented to the decree sought by the plaintiff.[4]

If the trustee admits that he holds the fund as trustee for some person or persons, and the Court sees a reasonable probability that the plaintiff will establish his title at the hearing, it will order the trustee to pay the trust-fund into Court.[5] In *Richardson* v. *The Bank of England*[6] Lord Cottenham said: "I must, in the first place, observe, that the motion for payment into Court by the defendant of the sum mentioned in the order must be considered as founded upon the supposition of that sum being due from him. It is not the case of a contest as to the title to any particular property, in which the Court will, in some cases, take possession of the subject-matter of the contest for security, until it adjudicates upon the right. Such cases generally arise where the property is in the hands of estate-holders, factors, or trustees, who do not themselves claim any title to it. In ordering money into Court under such circumstances, the Court does not disturb the possession of any party claiming title, or direct a payment before the liability to pay is established."

[1] Wilton *v.* Hill, 2 D. M. G., 807; Hamond *v.* Walker, 3 Jur., N. S., 686.

[2] Marryat *v.* Marryat, 23 L. J., N. S., Ch., 876.

[3] Lewellin *v.* Cobbold, 1 Sm. & G., 572.

[4] Satoor *v.* Satoor, 2 Mad., 10.

[5] M'Hardy *v.* Hitchcock, 11 Beav., 73; Whitmore *v.* Turquand, J. and H., 296; Dolder *v.* Bank of England, 10 Ves., 355; but see Dubless *v.* Flint, 4 M. and C., 502.

[6] 4 M. and C., 170.

LECTURE XI.

Payment in of share.

It is not necessary that the whole fund should be paid into Court, but where the defendant is clearly entitled to a definite share, he will only be ordered to pay in the shares which are claimed by other parties;[1] and it is not necessary that the defendant should expressly admit that there is trust-money in his hands, it is sufficient if it is shown that he has been served with notice of the intended motion, and has not disputed the affidavit which it is proposed to read to show that he received the fund.[2]

Payment after decree.

When a decree has been made, and the Court finds from the evidence that a certain amount will be found due from the defendant, but that, by reason of unavoidable delay in ascertaining how much will be due, no final decision as to the ultimate balance of the account can be arrived at, it has power to order such amount to be paid into Court;[3] and money may be ordered to be paid in at the hearing without a notice of motion for that purpose having been given.[4] The principle is, that the *cestui que trust* is entitled to have the trust-fund secured by a decree of the Court.[5]

Payment in of fund not received.

Trustees may be ordered to pay the amount of a trust-fund into Court, although it is not in their hands, if it appears that they might have at any time received it. So, trustees cannot excuse themselves from their liability on the ground that a co-trustee has obtained possession of the fund and misapplied it,[6] or indeed that they have lost the fund by any neglect of their duty.[7]

Admission of receipt of money by trustee.

Where an executor or trustee admits that he has received a certain sum belonging to the testator's estate, but adds that he has made payments, the amount of which he does not specify, the Court will allow him to verify the amount of his payments by affidavit, and order him, on motion, to pay the balance into Court,[8] and may allow him to retain a reasonable sum for expenses and commission.[9]

[1] Rogers *v.* Rogers, 1 Anst., 174; Hamond *v.* Walker, 3 Jur., N. S., 686; Score *v.* Ford, 7 Beav., 336.

[2] Freeman *v.* Cox, L. R., 8 Ch. Div., 148; see as to the old rule in England, Lewin, 7th Edn., 837.

[3] London Syndicate *v.* Lord, L. R., 8 Ch. Div., 89, *per* Jessel, M. R.

[4] Isaacs *v.* Weatherstone, 10 Hare, App., 30.

[5] Governesses' Institution *v.* Rusbridger, 18 Beav., 469.

[6] Ingle *v.* Partridge, 32 Beav., 661.

[7] See Lewin, 7th Edn., 869, where the cases are collected.

[8] *Anon.*, 4 Sim., 359; Proudfoot *v.* Hume, 4 Beav., 476.

[9] Roy *v.* Gibbon, 4 Hare, 65.

The mere fact that the defendant makes admissions which would entitle the plaintiff to a decree, is not sufficient to warrant the Court in ordering money to be paid into Court;[1] there must be an admission that the defendant has a fund, and that the plaintiff is entitled to it.[2] So, if two persons are jointly liable, one of them cannot, before the extent of the joint liability has been ascertained, compel the other to pay the estimated proportion of his supposed liability into Court.[3] And the Court will not order interest on the fund in the trustee's hands to be paid into Court, unless there is an admission that he has made interest, even though it is clear that he will ultimately have to pay interest.[4]

There are cases where the Court has apparently ordered the payment of a debt upon motion, as where an executor or trustee admits himself to owe a debt to the estate he represents. In those cases the person to pay and the person to receive being the same, the Court assumes that what ought to have been done has been done, and orders the payment, not as of a debt by a debtor, but as moneys realized in the hands of the executor or trustee.[5]

The mere existence of a discretionary power in trustees affords no reason why the Court should not order payment of the fund into Court. But the Court will not order such payment to be made when it appears that trustees are about to exercise their discretion in a proper manner.[6]

The Court will give the defendant a reasonable time within which to transfer the fund into Court. If the fund is capable of immediate transfer, it will have to be paid in at once; but if it is outstanding on securities, time will be given to realize.[7]

Appointment of receiver.

The Court will, upon the application of all the parties beneficially interested, appoint a receiver of the trust-estate

[1] Peacham *v.* Daw, 6 Madd., 98.
[2] Richardson *v.* The Bank of England, 4 M. and C., 174.
[3] *Ibid.*
[4] Freeman *v.* Fairlie, 3 Mer., 43; Wood *v.* Downes 1 V. and B., 50: and see Rothwell *v.* Rothwell, 2 S. and S., 217; Richardson *v.* Bank of England, 4 M. and C., 174.
[5] Richardson *v.* The Bank of England, 4 M. and C., 174; see White v. Barton, 18 Beav., 192.
[6] Talbot *v.* Marshfield, 2 Dr. & Sm., 285.
[7] Vigrass *v.* Binfield, 3 Madd., 62; Wyatt *v.* Sharratt, 3 Beav. 498; Hinde *v.* Blake, 4 Beav., 597; Score *v.* Ford, 7 Beav., 333; Roy *v.* Gibbon, 4 Hare, 65.

LECTURE XI.

when any of the trustees refuse to act.[1] But a receiver will not be appointed without sureties, even if he is not objected to, when persons not competent to consent are parties.[2]

If all the parties do not consent to the appointment, any one of the *cestuis que trustent* may apply. A strong case must be made out.[3] The fact that a trustee or executor is poor is not of itself a sufficient ground,[4] unless he is in other respects unfit, as for example, if he is of drunken habits, or misapplication of the trust-funds is likely.[5] But if any misconduct, waste, or improper disposition of the assets is shown, the Court will instantly interfere.[6] If, for instance, an executor and trustee neglects to get in his testator's estate, and thereby deprives infant legatees of the maintenance or means of advancement provided for them by the will,[7] or if he is not impartial,[8] a receiver will be appointed. So a receiver will be appointed if the trustee is insolvent,[9] or bankrupt,[10] or incapacitated from acting,[11] or out of the jurisdiction.[12] A receiver was appointed where one of four trustees was dead, another had but little interfered in the trusts of the will, a third was abroad, and the fourth submitted to the appointment.[13] In another case three trustees had disagreed, and a receiver was appointed, the order was taken by arrangement between the parties, but the Court had previously expressed its opinion that, unless the trustees could agree, a receiver must be appointed.[14] Where three trustees disagreed, and

[1] Beaumont *v.* Beaumont, cited in Brodie *v.* Barry, 3 Mer., 696; Browell *v.* Reed, 1 Hare, 435.

[2] Manners *v.* Furze, 11 Beav., 30; Tylee *v.* Tylee, 17 Beav., 583.

[3] Middleton *v.* Dodswell, 13 Ves., 266; Barkley *v.* Lord Reay, 2 Hare, 306.

[4] Howard *v.* Papera, 1 Madd., 142; Hathornthwaite *v.* Russel, 2 Atk., 126.

[5] Everett *v.* Prythergch, 12 Sim., 367; Havers *v.* Havers, Barn., 23.

[6] *Anon.*, 12 Ves., 5; Evans *v.* Coventry, 5 D. M. G., 911.

[7] Richards *v.* Perkins, 3 Y. & C. Ex., 299.

[8] Talbot *v.* Hope Scott, 4 K & J., 139.

[9] Middleton *v.* Dodswell, 13 Ves., 266; Scott *v.* Becher, 4 Price, 346; Mansfield *v.* Shaw, 3 Madd., 100.

[10] Gladdon *v.* Stoneman, 1 Madd., 143 (*n*); Langley *v.* Hawk, 5 Madd., 46.

[11] Bainbrigge *v.* Blair, 3 Beav., 421; Taylor *v.* Allen, 2 Atk., 213.

[12] Noad *v.* Backhouse, 2 Y. & C. C. C., 529; Smith *v.* Smith, 10 Hare., lxxi.

[13] Tidd *v.* Lister, 5 Madd., 430.

[14] Lewin, 7th Edn., 813, citing Day *v.* Croft, May 2, 1839, M. R.; and Hart *v.* Denham, W. N., 1871, p. 2.

two of them acted together and took securities in their own names, omitting the name of the dissentient trustee, it was held that a *cestui que trust* was entitled to a receiver.[1]

It is not a sufficient ground for the appointment of a receiver that one of several trustees has disclaimed.[2] But if there are only two trustees, and one disclaims, a receiver may be appointed; and either of the trustees may be at liberty to offer himself.[3] Nor is it the practice to appoint a receiver solely because one of several trustees is inactive, or has gone abroad.[4] And the fact that trustees have let a purchaser into possession before receiving the purchase-money, is not, of necessity, such misconduct as to induce the Court to interfere.[5]

Where a receiver is appointed under the authority of the Court, he is appointed for the benefit of all parties interested; and therefore, he will not be discharged merely on the application of the parties at whose instance he is appointed.[6]

Necessary parties to a suit.

Suits in equity affecting trusts are either (1) between strangers on the one hand and the persons interested in the trust on the other; or (2) between persons interested in the trust *inter se*.[7]

Suits by or against strangers.

I. As a general rule, according to English practice, in suits by or against strangers, all the trustees and all the *cestuis que trustent*, as together constituting but one interest, must be made parties.[8]

Civil Procedure Code.

The Civil Procedure Code[9] provides, that "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action; and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to without any amendment." Section 27 contains provisions for substituting or adding plaintiffs. And s. 28 provides, that "all persons may be joined as defendants against whom the right to any relief

[1] Swale *v.* Swale, 22 Beav., 584.
[2] Browell *v.* Reed, 1 Hare, 434.
[3] Tait *v.* Jenkins, 1 Y. & C. C. C., 492.
[4] Browell *v.* Reed, 1 Hare, 435.
[5] *Ibid.*
[6] Bainbrigge *v.* Blair, 3 Beav., 423.
[7] Lewin, 6th Edn., 796.
[8] Bifield *v.* Taylor, 1 Moll., 198; Adams *v.* St. Leger, 1 B. and B., 184.
[9] Act X of 1877, s. 26.

LECTURE XI.

is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same matter; and judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities without any amendment."

Section 437, as amended by Act XII of 1879, s. 72, however, modifies the general rule as to parties. By that section it is provided, that "in all suits concerning property vested in a trustee, executor, or administrator, when the contention is between the persons beneficially interested in such property and a third person, the trustee, executor, or administrator shall represent the persons so interested; and it shall not, ordinarily, be necessary to make them parties to the suit. But the Court may, if it think fit, order them, or any of them, to be made such parties."

Succession Act, s. 187.

The Succession Act[1] provides, that "no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the province shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration under s. 180."

The provisions of this section extend to Hindus, Jainas, Sikhs, and Buddhists.[2]

Section 190 of the Succession Act[3] provides, that "no right to any part of the property of a person who has died intestate can be established in any Court of Justice unless letters of administration have been first granted by a Court of competent jurisdiction."

This section has not been extended to Hindus, Jainas, Sikhs, or Buddhists.[4]

Suits for specific performance.

In suits for the specific performance of a contract, or to have it cancelled upon any ground, the general rule is, that the parties to the contract are the only parties to the suit, and therefore if trustees enter into a contract, not as the agents of their *cestuis que trustent*, but as principals (though the property of the *cestuis que trustent* is in fact concerned), they may sustain a suit either as plaintiffs or defendants without the presence of the *cestuis que trustent*; and not only is it unnecessary, but in many cases it would be highly improper, to make the *cestuis que trustent* parties. But where persons, sustaining a fiduciary character, enter

[1] X of 1865, s. 187.
[2] Act XXI of 1870, s. 7.
[3] X of 1865.
[4] Act XXI of 1870, s. 1.

into a contract, not as principals, but on behalf and as the agents of other parties, those other parties as the principals, and not their agents, are the proper parties to sue.[1]

Representative specially constituted.

Where several persons have united in constituting another their representative in a matter for all purposes, there, it seems, such representative may sue or be sued in the absence of the *cestui que trust.* But the intention to constitute such a representative must clearly appear; for trustees are not themselves owners of the property: they are, in a sense, agents for the owners in executing the trust; but they are not constituted agents for the purpose of defending the owners against the adverse claims of third parties.[2]

Suits between trustees and *cestuis que trustent.*

II. In suits between trustees and *cestuis que trustent,* it is a general rule that all the trustees and all the *cestuis que trustent* must be parties, the object being to take the necessary accounts at once, and to avoid multiplicity of suits;[3] and the rule holds good even though the liability of the trustees as between themselves may hereafter have to be ascertained in a suit for contribution.[4] A third person who reaps the benefit of a breach of trust must be made a party, as he is liable to the *cestuis que trustent.*[5] But a transferree from the trustees without notice of a breach of trust is not a necessary party.[6]

Representatives of deceased trustee.

The representatives of a deceased trustee may be made parties, but a plaintiff may waive any relief as against them.[7] And it is not necessary to make the representatives of a deceased trustee, who, when he died, had no interest in the subject-matter of the suit, parties.[8] Nor is it necessary to make them parties, if the deceased trustee was not a party to a breach of trust in respect of which relief is sought,[9] or if the suit is not for the purpose of charging the trustees personally.[10]

[1] Lewin, 6th Edn., 798; and see Act I of 1877, s. 27.
[2] Lewin, 6th Edn., 799.
[3] Latouche *v.* Dunsany, 1 Sch. and Lef., 137; 2 Sch. and Lef., 690; Coury *v.* Cantfield, 2 B. and B., 255.
[4] Perry *v.* Knott, 4 Beav., 180.
[5] Perry *v.* Knott, 4 Beav., 179; 5 Beav., 297; Consett *v.* Bell, 1 Y. and C. C. C., 569; Williams *v.* Allen, 29 Beav., 292; 4 D. F. J., 71.
[6] Knye *v.* Moore, 1 S. and S., 61.
[7] Selyard *v.* Harris, 1 Eq. Ca. Ab., 74; Moore *v.* Blake, 1 Moll., 284.
[8] Beattie *v.* Johnstone, 8 Hare, 169.
[9] Simes *v.* Eyre, 6 Hare, 137.
[10] London Gas Light Company *v.* Spottiswoode, 14 Beav., 271.

LECTURE XI.

When trustee unnecessary party.

So a trustee who disclaims,[1] or is beyond the jurisdiction of the Court,[2] or cannot be compelled to appear,[3] need not be made a party. An insolvent trustee must be made a party, for he may subsequently be in a position to meet his liability;[4] but it is not necessary to make his representatives parties, for they can have no assets.[5] And it is not necessary to make a trustee party who has been discharged and has transferred his interest,[6] or a trustee who is a mere agent.[7]

Cestui que trust abroad.

If a *cestui que trust* is abroad and cannot be found, he should be made a party, and the suit may proceed in his absence; but the Court will protect his interest in the decree, and he may subsequently come in and have the decree amended.[8] If, however, his interest is proposed to be affected, no decree can be made in his absence.[9]

Suit for aliquot share.

In a suit by a *cestui que trust* for an aliquot share in an ascertained fund, the other *cestuis que trustent* need not be parties.[10] But if the fund is not ascertained, the other *cestuis que trustent* must be parties.[11]

Suit between trustees.

In a suit between trustees to recover a fund which has been lost by the breach of trust of the defendant, the *cestuis que trustent* need not be parties.[12] But in a suit for contribution between trustees, a *cestui que trust* who has concurred in the breach of trust must be made a party.[13] Persons who claim adversely to the trust cannot be parties to a suit for the execution of the trust.[14]

Executors and administrators.

Where there are several executors or administrators they must all be made parties to a suit against one or more of them. But executors who have not proved their testator's

[1] Wilkinson *v.* Parry, 4 Russ., 274. [2] Walley *v.* Walley, 1 Vern., 487.
[3] Butler *v.* Prendergast, 2 Bro. P. C., 174.
[4] Thorpe *v.* Jackson, 2 Y. and C. Ex., 560; Haywood *v.* Ovey, 6 Madd., 113.
[5] Devaynes *v.* Robinson, 24 Beav., 98; Moore *v.* Morris, L. R., 13 Eq., 139.
[6] Bromley *v.* Holland, 7 Ves., 11; Reed *v.* O'Brien, 7 Beav., 32.
[7] Slade *v.* Rigg, 3 Hare, 35.
[8] Attorney-General *v.* Balliol College, 9 Mod., 407; Willats *v.* Busby, 5 Beav, 193.
[9] Browne *v.* Blount, 2 R. and M., 83; Holmes *v.* Bell, 2 Beav., 298; Willats *v.* Busby, 5 Beav., 193.
[10] Hutchinson *v.* Townsend, 2 Keen, 675; Hughson *v.* Cookson, 3 Y. and C Ex., 578; Perry *v.* Knott, 5 Beav., 293.
[11] Lenaghan *v.* Smith, 2 Ph., 301; Alexander *v.* Mullins, 2 R. and M. 568.
[12] Peake *v.* Ledger, 4 DeG. and Sm., 137; Noble *v.* Meymott, 14 Beav., 471: Bridgman *v.* Gill, 24 Beav., 302.
[13] Jesse *v.* Bennett, 6 D. M. G., 609.
[14] Attorney-General *v.* Portreeve of Avon, 3 DeG. J. and S., 637.

will, and executors and administrators beyond the local limits of the jurisdiction of the Court, need not be made parties.[1] And unless the Court directs otherwise, the husband of a married administratrix or executrix need not be a party to a suit against him or her.[2]

Suit by one *cestui que trust* on behalf of others.

If the *cestuis que trustent* are very numerous, some may sue or defend on behalf of the others. The Civil Procedure Code[3] provides, that, "where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue or be sued, or may defend in such suit on behalf of all parties so interested. But the Court shall, in such case, give, at the plaintiff's expense, notice of the institution of the suit to all such parties either by personal service, or (if from the number of parties or any other cause such service is not reasonably practicable), then by public advertisement, as the Court in each case may direct."

The trustees must in such a case be parties.[4]

When allowable.

In order that some *cestuis que trustent* may sue on behalf of others, the relief sought must be beneficial to those on whose behalf the suit is brought, and their interests must be identical.[5] What number of *cestuis que trustent* will be considered 'numerous' is not very clear, but apparently any number over twenty-one will be so treated.[6]

Severing defence.

"In a contest between the trust on the one hand and a stranger on the other, the trustees and *cestuis que trustent* represent but one interest, and costs must not be multiplied unnecessarily by the severance of them in the suit."

Sir Anthony Hart laid it down, that a *cestui que trust* about to file his bill, ought to apply to his trustee to allow his name to be used as co-plaintiff. This (he said) the trustee is bound to comply with upon being indemnified against costs. Should the trustee refuse, he would be departing from his duty; and, in such a case would not be entitled to his costs when made defendant in consequence of his refusal. But where no application is made to the trustee to permit his name to be used as co-plaintiff, he is in no default; and the *cestui que trust* would be bound to

[1] Act X of 1877, s. 438. [2] *Ibid*, 439. [3] Act X of 1877, s. 30.

[4] Holland *v.* Baker, 3 Hare. 68.

[5] Bainbridge *v.* Burton, 2 Beav., 539; Richardson *v.* Larpent, 2 Y. and C. C. C., 507; Evans *v.* Stokes, 1 Keen, 24.

[6] Harrison *v.* Stewardson, 2 Hare, 533; Smart *v.* Bradstock, 7 Beav., 500; Bateman *v.* Margerison, 6 Hare, 496.

LECTURE XI.

pay the costs of the trustee for his own unreasonable negligence in not having required the trustee to be co-plaintiff."[1]

Trustees and *cestuis que trustent*, if they are made defendants in the same right, should not sever in their defence and put in separate written statements;[2] they cannot be compelled to join,[3] but only one set of costs will be allowed if they do not.[4]

In suits by *cestuis que trustent*, against trustees, all the *cestuis que trustent*, whose interests are identical, should join as plaintiffs.[5]

Costs of severing.

Trustees should defend jointly, and will only be allowed one set of costs if they do not, which will be apportioned between them,[6] unless one trustee has expressed his willingness to join, when he alone will get his costs;[7] and an innocent trustee need not join with a co-trustee who has been guilty of a breach of trust, and who is the accountable defendant.[8] The costs in such a case will be awarded to the innocent trustee. So trustees will be justified in severing if their answers would be different, or if they are residing so far apart that a joint written statement is impracticable.[9]

Costs in suits between strangers and parties to trust.

In suits between strangers and trustees, and *cestuis que trustent*, as in the case of a suit for specific performance of a contract, if the trustees are unsuccessful, they must pay the costs.[10] If a suit by a stranger is dismissed with costs, a trustee who is a defendant will not, as is usual between trustee and *cestui que trust*, be ordered his costs as between attorney and client, but only as between party and party.[11]

Between trustees and *cestuis que trustent*.

When the suit is between the trustees and *cestuis que trustent*, the general rule is, that the trustees shall have

[1] Lewin, 6th Edn., 811.
[2] Woods *v.* Woods, 5 Hare, 229; Farr *v.* Sheriffe, 4 Hare, 528.
[3] Van Sandau *v.* Moore, 1 Russ., 441.
[4] Lewin, 6th Edn., 811.
[5] Hosking *v.* Nicholls, 1 Y. and C. C. C., 478.
[6] Gaunt *v.* Taylor, 2 Beav., 347; Shovelton *v.* Shovelton, 32 Beav., 143; Course *v.* Humphrey, 26 Beav., 402; Attorney-General *v.* Wyville, 28 Beav., 464.
[7] Attorney-General *v.* Cuming, 2 Y. and C. C. C., 156.
[8] Webb *v.* Webb, 16 Sim., 55; Cummins *v.* Bromfield, 3 Jur., N. S., 657.
[9] See further Lewin, 6th Edn., 312.
[10] Burgess *v.* Wheate, 1 Eden, 251, *Ex parte* Angerstein, L. R., 9 Ch., 479; Elsey *v.* Lutyens, 8 Hare, 164.
[11] Mohun *v.* Mohun, 1 Swanst., 201; Saunders *v.* Saunders, 3 Jur., N. S., 727.

their costs either out of the trust estate or from the *cestuis que trustent* personally if they are of age.[1]

Costs out of fund.

If there is a fund in Court,[2] or if there is no fund in Court, if the trustees have been blameless, they are entitled to their costs as between solicitor and client; in the latter case, as against the trustees personally.[3]

Costs, charges, and expenses.

When it appears that the trustees have sustained charges and expenses beyond the costs of suit, they will be allowed costs, charges, and expenses properly incurred. But an order made in a suit in this form will not include costs, charges, and expenses incurred in defending other suits, unless they are specially mentioned.[4] As to costs in creditor's and legatee's suits, where the fund is deficient, see Lewin, 6th Edn., p. 829.

Disclaimer.

A trustee who disclaims will be entitled to his costs as between party and party.[5]

Costs after decree.

Where a trustee did not appear at the hearing, and a decree *nisi* was made against him, and the trustee set down the cause again, and prayed to have his costs of the suit upon paying the costs of the day, the order was made. But if the decree has been passed, a trustee who has omitted to ask for his costs at the hearing, cannot have the cause re-heard upon the subject of costs only, and cannot obtain an order for payment of his costs upon presenting a petition.[6]

Suit necessary by act of trustee.

If a suit has been rendered necessary by the misconduct, negligence, or caprice of the trustee, he must, as we have seen, pay the costs personally; and if such an order is made, he cannot deduct the costs from the trust fund.[7] If, however, the wrongful acts charged have only been partially proved, the trustee will only have to pay costs in respect of the allegations proved.[8] So if he has not been guilty of any wilful breach of trust, but the suit has been rendered necessary by an innocent mistake, the Court will not order him to pay the costs of the other side, and may even allow him his costs.[9] And if a breach of trust is discovered in

[1] Hall *v.* Hallet, 1 Cox., 141; Attorney-General *v.* City of London, 3 Bro. C. C., 171; Rocke *v.* Hart, 11 Ves., 58; Taylor *v.* Glanville, 3 Madd., 176.
[2] Mohun *v.* Mohun, 1 Swanst, 201; Moore *v.* Frowd, 3 M. & C., 49.
[3] Attorney-General *v.* Cuming, 2 Y. & C. C. C., 155; Edenborough *v.* Archbishop of Canterbury, 2 Russ., 112.
[4] Payne *v.* Little, 27 Beav., 83.
[5] Norway *v.* Norway, 2 M. and K., 278.
[6] Lewin, 6th Edn., 829.
[7] Attorney-General *v.* Dangars, 33 Beav., 621.
[8] Pocock *v.* Redington, 5 Ves., 800, Sanderson *v.* Walker, 13 Ves., 601.
[9] See Lewin, 6th Edn., 831.

LECTURE XI.

the course of a suit, the trustee will only have to pay so much of the costs as are thereby occasioned.[1] After a trustee has cleared his default, he will be allowed his subsequent costs.[2]

Accounts.

It has been decided, that though, as a general rule, when a trustee commits a breach of trust, he must pay the costs of a suit to repair it, yet he will be entitled to his subsequent costs relating to the ordinary taking of the accounts.[3] If, however, the taking of the accounts has been rendered necessary by the breach of trust, it is difficult to see why the trustee should be exonerated from paying the costs incident to the accounts.

Law doubtful.

Trustees will not have to bear the costs of discussing a doubtful point of law.[4] But a trustee will have to pay the costs of a suit instituted for the purpose of determining a question relating to his own private interests.[5] And as a general rule it may be laid down that a trustee, who refuses to account, or claims to be a creditor of the trust fund, or denies assets, or behaves in an obstructive way in the taking of the accounts, will be ordered to pay the costs caused by his misconduct.[6]

[1] Tebbs *v.* Carpenter, 1 Madd., 290; Pride *v.* Fooks, 2 Beav., 430.
[2] Birks *v.* Micklethwait, 33 Beav., 409.
[3] Hewett *v.* Foster, 7 Beav., 348; Bate *v.* Hooper, 5 D. M. G., 345; *Re* King, 11 Jur., N. S., 899.
[4] Raphael *v.* Boehm, 13 Ves., 592.
[5] Henley *v.* Phillips, 2 Atk., 48.
[6] See Lewin, 6th Edn., 833.

LECTURE XII.

RELIGIOUS AND CHARITABLE TRUSTS.

Religious and charitable trusts — Trust of immoveable property — Bequests to religious or charitable uses — What are charitable purposes — Religious purposes — Inhabitants of particular place — Improvement of particular place — Trust for particular classes or persons — Educational purposes — Gift must be for the public — Must be certain — Morice *v.* Bishop of Durham — Instances of uncertainty — Principles of construing will — *Cy pres* — Altering scheme — Gift for charitable purposes generally — Particular purpose failing, where gift is to charity generally — Particular charity not described — Failure of object where no intention to give to charity generally — Apportionment of fund — Gift over — Charity in foreign country — Breach of trust — Mode of procedure to obtain redress — Civil Procedure Code, s. 539 — Liability of trustees to account — New trustee — New trustees of society for maintaining religious worship — Memorandum of appointment — Vesting — Appointment of Official Trustee to charitable trust — Vesting property in trustees of charity — Visitors — Controlling revenues of charity — Subsequent gift — Purchaser without notice from purchaser with notice — Alienation of charity-estate — Religious trusts among Hindus — Perpetuities — Colourable gift to idol — Gift must be certain — Gifts to religious or charitable uses by Oudh taluqdars — Tenure in trustee — Trust imperfect — Devise subject to trust — Sale of property subject to trust — Partition subject to trust — Alienation — Evidence of endowment to be given — How far sale set aside — Trustee may not benefit by sale — Sale of turn of worship — Succession to trusteeship — Enjoyment of endowed property — Turn of worship — Limitation — Management vested in different persons — Proof of succession — Succession where manager bound to celibacy — Reversion — Removal of trustee — Removal of mohunt — Religious trust irrevocable — Execution of trust — Principles to be followed — Right to erect place of worship — Religious trusts among Mahomedans — Elements of *wuqf*, Creation of — Evidence of appropriation — *Wuqf* to take effect after settlor's death — Requisites to valid *wuqf* — Undue influence — Endowment subject to mortgage — Revocation — Alienation of *wuqf* property — Nominal endowment — Alienation subject to trust — Mortgage by local custom — Lease of *wuqf* property — Transfer of trust — Purchaser from trustee — Breach of trust — Removal of trustee — Office of trustee — Female may be mutawalli — Succession to the office — Suits in respect of *wuqf* property.

Religious and charitable trusts.

In this Lecture I shall deal with the English law relating to religious and charitable trusts, the Hindu law on the same subject, and the Mahomedan law of *wuqf*. The provisions of Act XX of 1863, an Act to enable the Government to divest itself of the management of religious endowments, will be found in the Appendix.

LECTURE XII.

Charities may be established by charter, or may be placed under the management of individual trustees. A charitable gift is a gift to the general public, and extends to the poor as well as to the rich.[1]

According to English law, all trusts, whether of moveable or immoveable property, for superstitious purposes, come under the class of trusts void as being against the policy of the law. Such gifts are not void by the Common Law, but were first made void by the Statute,[2] by which gifts to superstitious uses then existing were expressly prohibited, such as gifts for prayers and masses for the benefit of the soul.[3] But this Statute does not apply to India.

Thus a gift for the performance of masses is valid. In *Das Merces* v. *Cones*,[4] Norman, J. said: "By the law of England, gifts to superstitious uses appear to be void, as being contrary to the policy of the law, for two reasons: *first*, because they tend to produce the same losses and inconveniences to the Crown and subjects of the realm, as in cases where lands are aliened in Mortmain, *see* the preamble of the Statute 23 Hy. VIII, c. 10; and, *secondly*, because the superstitions and errors in Christian religion have been brought into the minds and estimation of men, by reason of their ignorance of their every true and perfect salvation through the death of Jesus Christ, and by devising and phantasying vain hopes of purgatory, and masses satisfactory to be done for those which be departed, which doctrine and vain opinion by nothing more is maintained and upholden than by the abuse of trentals (offices for the dead continuing thirty days or consisting of thirty masses), charities, or other provisions made for the continuance of the said blindness and ignorance. *See* the preamble of Statute I Ed. VI, c. 14. So in Bacon's Abridgment, title 'charitable uses,' and 'Mortmain' (*D*), it is said, that the king is entitled to such uses 'by force of several Statutes,

[1] Jones *v.* Williams, Amb., 651; Attorney-General *v.* Aspinall, 2 M. & C., 622; Kendall *v.* Granger, 5 Beav., 300; Trustees of the British Museum *v.* White, 2 S. and S., 596.

[2] 1 Ed. IV, c. 14.

[3] West *v.* Shuttleworth, 2 M. and K., 684; Attorney-General *v.* The Fishmongers' Co., 5 M. and Cr., 11; Heath *v.* Chapman, 2 Drew., 417; *In re* Blundell's Trusts, 30 Beav., 360.

[4] 2 Hyde, 65; and see Andrews *v.* Joakim, 2 B. L. R., O. C., 118; Judah *v.* Judah, 5 B. L. R., 433; Khusal Chand *v.* Mohadevgiri, 12 Bom. H. C. R., 214.

and as the head of Church and State, and entrusted by the Common Law to see that nothing is done in maintenance or propagation of a false religion.' A law intended for the support and maintenance of the Protestant branch of the Catholic Church, and to discourage the teaching of doctrines at variance with it, cannot have been intended to be introduced here at a time when the Christian religion was not, and never could have been supposed to be likely to be, the established religion of the country." His Lordship then referred to cases showing that the Statute did not extend to Ireland, and continued: "If such a gift be not void in Ireland, *a multo fortiori*, it is not void here, where the Crown cannot be supposed to have contemplated, either the end which the English legislature had in view in passing the Statute 14 Ed. VI, or the means by which that end was to be attained. It is clear, that the policy of the law intended to be introduced into this country not only by the Charter of Geo. I, but by all subsequent Charters and Acts, was one of toleration; that the English Government never considered it as any part of their duty to impose the Protestant religion on their subjects, or in any way to interfere with their religious opinions or practices connected therewith, however erroneous or false . . . . For the above reasons, I am of opinion that that portion of Common Law which declares gifts to superstitious uses void, does not apply to the gifts of persons born and domiciled in Calcutta."

Trust of immoveable property.

In England, devises of immoveable property for charitable purposes are void under the Mortmain Act.[1] This Statute does not extend to India, as the object for which it was passed was purely political. "I conceive," said Grant, M. R.,[2] "that the object of the Statute of Mortmain was purely political, that it grew out of local circumstances, and was meant to have merely a local operation. It was passed to prevent what was deemed a public mischief, and not to regulate, as between ancestor and heir, the power of devising, or to prescribe, as between grantor and grantee, the forms of alienation. It is incidentally only, and with reference to a particular object, that the exercise of the owner's dominion over his property is abridged . . . Framed as the Mortmain Act is, I think it is quite inapplicable to *Grenada*, or to any other colony. In its causes, its objects,

[1] 9 Geo. II, c. 36.

[2] Attorney-General *v.* Stewart, 2 Mer., 161.

LECTURE XII.

its provisions, its qualifications, and its exceptions, it is a law wholly English, calculated for the purposes of local policy, complicated with local establishments, and incapable without great incongruity in the effect, of being transferred as it stands into the code of any other country." [1]

Persons governed by the English law in this country may, therefore, subject however to the provisions of the Succession Act,[2] create trusts of immoveable property for religious or charitable purposes.

Section 105 of that Act provides that—

Bequests to religious or charitable uses.

"No man having a nephew or niece, or any nearer relative, shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons."

And the following illustration is given:—

"*A* having a nephew makes a bequest by a will not executed, nor deposited as required—

For the relief of poor people;
For the maintenance of sick soldiers;
For the erection or support of a hospital;
For the education and preferment of orphans;
For the support of scholars;
For the erection or support of a school;
For the building or repairs of a bridge;
For the making of roads;
For the erection or support of a church;
For the repairs of a church;
For the benefit of ministers of religion;
For the foundation or support of a public garden;
All these bequests are void."

Subject to the foregoing limitations, bequests of any property for charitable or religious purposes are valid.

What are charitable purposes.

Charitable purposes are: the relief of aged and impotent people; the maintenance of sick and maimed soldiers and poor mariners; schools of learning; free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; the education

[1] And see Mayor of Lyons *v.* East India Co., 1 Moo. I. A., 175; Das Merces *v.* Cones, 2 Hyde, 70; Sarkies *v.* Prosonnomoyee Dossee, I. L. R., 6 Calc., 794; Yeap Cheah Neo *v.* Ong Cheng Neo, L. R., 6 P. C., 381. In Broughton *v.* Mercer, 14 B. L. R., 442, a devise of immoveable property to trustees in trust for hospital purposes was supported as a charitable trust.

[2] X of 1865.

and maintenance of orphans; the relief, stock, or maintenance of houses of correction; the marriages of poor maids; the aid and help of young tradesmen, craftsmen, and persons decayed; and the relief or redemption of prisoners or captives.[1]

Religious purposes.

Besides these, gifts of personal property for the purpose of upholding the doctrines of Dissenters of various denominations,[2] Roman Catholics,[3] and Jews,[4] are valid. The gift may be either for the particular religious object or to a minister as such.[5] So, gifts of funds to be employed in the purchase of bibles and other religious books,[6] for keeping the chimes of a church in repair, for payments to be made to singers in the gallery of a church,[7] to build an organ gallery in a church,[8] and to keep in repair and ornament a church,[9] are gifts for charitable purposes, and valid. A gift of land or money for the purpose of building a church, or a house, or otherwise for the maintaining and propagating the worship of God, without more, will be considered as a gift for maintaining and propagating the established religion. But if it is clearly expressed, that the purpose is that of maintaining dissenting doctrines, so long as they are not contrary to law, the Court will execute the trust according to the express intention.[10]

Inhabitants of particular place.

Gifts for the widows and children of seamen of a certain port,[11] to the widows and orphans,[12] or poor inhabitants[13] of a certain parish, for the purpose of building and endowing an almshouse,[14] or hospital,[15] for the use of the inhabitants of

[1] 43 Eliz., c. 4.
[2] Attorney-General *v.* Cock, 2 Ves., 273; Shrewsbury *v.* Hornby, 5 Hare, 406; Attorney-General *v.* Lawes, 8 Hare, 32; Thornton *v.* Howe, 8 Jur., N. S., 663; 1 Wm. and M. C., 18; 55 Geo. III, c. 160.
[3] Walsh *v.* Gladstone, 1 Ph., 290; 2 and 3 Will. IV, c. 115.
[4] *In re* Michel's Trust, 28 Beav., 39; 8 and 9 Vict., c. 59, s. 2.
[5] Attorney-General *v.* Lawes, 8 Hare, 32; Thornber *v.* Wilson, 3 Drew., 245; 4 *ibid*, 350.
[6] Attorney-General *v.* Stepney, 10 Ves., 22.
[7] Turner *v.* Ogden, 1 Cox, 316.
[8] Adnam *v.* Cole, 6 Beav., 353.
[9] Hoare *v.* Osborne, L. R., 1 Eq., 585.
[10] Attorney-General *v.* Pearson, 3 Mer., 409.
[11] Powell *v.* Attorney-General, 3 Mer., 48.
[12] Attorney-General *v.* Comber, 2 S. and S., 93; Russell *v.* Kellett, 3 Sm. and G., 264; Thompson *v.* Corby, 27 Beav., 649.
[13] Attorney-General *v.* Clarke, Ambl., 422; Bishop of Hereford *v.* Adams, 7 Ves., 324.
[14] Attorney-General *v.* Tyndall 2 Eden, 207.
[15] Pelham *v.* Anderson, *ibid*, 296.

LECTURE XII.

Improvement of particular place.

Trust for particular classes of persons.

a certain town,[1] and for the improvement of a certain town,[2] are gifts for charitable purposes. Such a gift as the last-mentioned one will be construed to mean improvements carried on under statutory powers and not by private persons.[3] So, a gift for the benefit and advantage of the country,[4] or a gift in exoneration of the national debt,[5] or for the assistance of literary persons who have not been successful in their career,[6] for the increase and encouragement of good servants,[7] for the release of debtors from prison,[8] and for the redemption of slaves,[9] are valid as gifts for charitable purposes. But a bequest for purchasing the discharge of poachers "committed to prison for nonpayment of fines, fees, or expenses under the game laws," was held to be void, as encouraging offences and opposed to public policy.[10]

Educational purposes.

Again, gifts for the purpose of founding schools,[11] scholarships,[12] or lectureships,[13] for the benefit of a particular college,[14] for the advancement and propagation of education and learning in every part of the world,[15] are good charitable gifts. In *Beaumont* v. *Olivera*[16] gifts to the Royal Society, which has for its object the improvement of natural knowledge, and the Royal Geographical Society, the object of which is the improvement and diffusion of geographical knowledge, were held to be good. So gifts to the British Museum,[17] and for the purpose of establishing a perpetual botanical garden,[18] are gifts for charitable purposes.[19]

Gift must be for the public.

The gift must be for public purposes. Thus gifts for private purposes, such as keeping up a tomb,[20] a private

[1] Jones *v.* Williams, Amb., 651; Mitford *v.* Reynolds, 1 Ph., 185; Attorney-General *v.* Bushby, 24 Beav., 299.
[2] Howse *v.* Chapman, 4 Ves., 542. [3] *Ibid.*
[4] Nightingale *v.* Goulburn, 2 Ph., 594.
[5] Newland *v.* The Attorney-General, 3 Mer., 684.
[6] Thompson *v.* Thompson, 1 Coll., 395.
[7] Loscombe *v.* Wintringham, 13 Beav., 87.
[8] Attorney-General *v.* Painter-Stainers Co., 2 Cox, 51.
[9] Attorney-General *v.* The Ironmongers' Co., 2 M. and K., 576.
[10] Thrupp *v.* Collett, 26 Beav., 125.
[11] Attorney-General *v.* Earl of Lonsdale, 1 Sim., 105.
[12] Rex *v.* Newman, Levinz, 284.
[13] Attorney-General *v.* Margaret and Regius, Professors, 1 Vern., 54.
[14] Attorney-General *v.* Tancred, 1 Eden, 10.
[15] Whicker *v.* Hume, 7 H. L. C., 124. [16] L. R., 4 Ch., 309.
[17] The Trustees of the British Museum *v.* White, 2 S. and S., 594.
[18] Townley *v.* Bedwell, 6 Ves., 194.
[19] See the Registration of Societies Act, XXI of 1860, and the Religious Societies Act, I of 1880, *post*, Appendix.
[20] *Ante*, p. 49; and see *In re* Williams, L. R., 5 Ch. Div., 735; *In re* Birkett, L. R., 9 Ch. Div., 576.

museum,[1] for the benefit of a private company,[2] or to be given in private charity,[3] are void if they infringe the rule against perpetuities.

Must be certain.

A trust for charitable purposes must not be uncertain and indefinite. Thus, a gift to executors, in trust to dispose of it at their pleasure, either for charitable or public purposes, or to any person or persons, in such shares as they should think fit, is too general and undefined to be executed by the Court.[4]

Morice v. Bishop of Durham.

In *Morice* v. *The Bishop of Durham*,[5] the leading case on the subject, a bequest in trust for such objects of benevolence and liberality as the trustee in his own discretion should approve, was held to be void. "That it is a trust," said Grant, M. R., "unless it be of a charitable nature, too indefinite to be executed by this Court, has not been, and cannot be, denied. There can be no trust over the exercise of which this Court will not assume a control; for an uncontrollable power of disposition would be ownership, and not trust. If there be a clear trust, but for uncertain objects, the property, that is the subject of the trust, is undisposed of; and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for a charity. Every other trust must have a definite object. There must be somebody in whose favour the Court can decree performance. But it is now settled, upon authority which it is too late to controvert, that, where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object; but the particular mode of application will be directed by the King in some cases, in others by this Court.

"Then is this a trust for charity? Do purposes of liberality and benevolence mean the same as objects of charity? That word, in its widest sense, denotes all the good affections men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in this Court. Here its

[1] Thomson v. Shakespear, 1 D. F. J., 399.
[2] Attorney-General v. Haberdashers Co., 1 M. and K., 420.
[3] Ommaney v. Butcher, 1 T. and R., 260.
[4] Vezey v. Jamson, 1 S. and S., 69; Fowler v. Fowler, 33 Beav., 616; *In re* Jarman's Estate, Leavers v. Clayton, L. R., 8 Ch. Div., 584.
[5] 9 Ves., 399.

LECTURE XII.

signification is derived chiefly from the Statute of Elizabeth (43 Eliz., c. 4). Those purposes are considered charitable which that Statute enumerates, or which by analogies are deemed within its spirit and intendment; and to some such purpose every bequest to charity generally shall be applied. But it is clear, liberality and benevolence can find numberless objects not included in that Statute in the largest construction of it. The use of the word 'charitable' seems to have been purposely avoided in this will, in order to leave the Bishop the most unrestrained discretion. Supposing the uncertainty to be no objection to its validity, could it be contended to be an abuse of the trust to employ this fund upon objects which all mankind would allow to be objects of liberality and benevolence, though not to be said, in the language of this Court, to be objects also of charity? By what rule of construction could it be said, all objects of liberality and benevolence are excluded which do not fall within the Statute of Elizabeth? The question is, not whether he may not apply it upon purposes strictly charitable, but whether he is bound so to apply it? I am not aware of any case in which the bequest has been held charitable, where the testator has not used that word to denote his general purpose, which this Court has determined to be charitable in its nature."[1]

In *Johnston* v. *Swann*,[2] *Jemmit* v. *Verril*,[3] *Waldo* v. *Coley*,[4] and *Horde* v. *The Earl of Suffolk*,[5] vague bequests were upheld. But with regard to these cases Lord Cottenham, L. C., in *Ellis* v. *Selby*,[6] said: "*Johnston* v. *Swann* and *Jemmit* v. *Verril* are directly at variance with the other cases on the same subject. *Waldo* v. *Coley* was determined before the decision, that a private charity could not be carried into effect by this Court;[7] that explains the case, and reconciles it with the other cases. In *Horde* v. *The Earl of Suffolk*, Sir John Leach took no notice of the objection that a private charity could not be carried into effect, although that objection appears to have been urged."

Instances of uncertainty.

So a gift to a corporation "for a purpose," where no purpose is expressed, is void for uncertainty.[8] Where a testator

[1] And see Williams *v.* Kershaw, 5 C. and F., 111; Ellis *v.* Selby, 1 M. and C., 286.

[2] Amb., 585 (*n*). [4] 16 Ves., 206. [6] 1 M. and C., 292.

[3] *Ibid.* [5] 2 M. and K., 59. [7] See *ante*, p. 354.

[8] Corporation of Gloucester *v.* Osborn, 1 H. L. C., 272; S. C., *nom.* Mayor of Gloucester *v.* Wood, 3 Hare, 131.

bequeathed a sum of money to the trustees of a chapel "to be appropriated according to statement appended," and no statement was appended, it was held, that the Court could not presume a charitable object in the bequest: and if not charitable, the object was so indefinite that the gift must fail.[1] But a bequest for such charities and other public purposes as lawfully might be "in a certain parish," is good, it being a gift to trustees to be laid out in charities for the benefit of the parish.[2]

Parol evidence is admissible to explain a latent ambiguity in the description of a charity in a will.[3]

Principles of construing will.

In construing a will containing charitable bequests, the Court must not lean to the side of avoiding the will in order to gain money for the family, nor, on the other hand, strain to support the will to gain money for the charity.[4] But when a charitable bequest is capable of two constructions, one of which would make it void, and the other which would render it effectual, the latter must be adopted.[5]

In construing a will relating to a charity of great antiquity, contemporaneous usage may be referred to.[6]

Cy près.

If a testator has manifested a general intention to give to charity, the failure of the particular mode in which the charity is to be effectuated will not destroy the charity; but the Court will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished, or, as it is called, will execute the testator's intention *cy près*, and for this purpose will direct a scheme to be framed.[7] The doctrine of *cy près* means, that where there is a general charitable purpose for an object mentioned by a testator of such a kind that the Court can satisfy itself that some other object can be found in a reasonable degree nearly answering such charitable purpose, then there shall be an application in favour of that object.[8] The jurisdiction of the Court to act on the *cy près* doctrine upon the failure of a specific charitable bequest arises whether the residue be given to

[1] Aston *v.* Wood, L. R., 6 Eq., 419.
[2] Dolan *v.* Macdermott, L. R., 3 Ch., 676; and see Pocock *v.* Attorney-General, L. R., 3 Ch. Div., 342.
[3] *In re* Kilvert's Trusts, L. R., 12 Eq., 183; *ib.*, 7 Ch, 170.
[4] Dolan *v.* Macdermott, L. R., 3 Ch., 678, *per* Lord Cairns.
[5] Bruce *v.* The Presbytery of Deer, L. R., 1 Sc. App., 96.
[6] Attorney-General *v.* Sidney Sussex College, L. R., 4 Ch., 722.
[7] Moggridge *v.* Thackwell, 7 Ves., 69.
[8] Russell *v.* Kellett, 3 Sm. and G., 264, *per* Stuart, V.C.

LECTURE XII.

charity or not, unless upon the construction of the will a direction can be implied that the bequest, if it fails, should go to the residue.[1]

Altering scheme.

The Court has power to alter from time to time the scheme of a charity which has been settled by a previous decree of the Court, if the circumstances require it.[2] But the Court will not subsequently change the application, even to a purpose identical with its original object, unless satisfied that the proposed application will be as beneficial as the existing one.[3] Apparently, when a scheme has once been settled for the application of a charitable fund, an alteration in it can only be made with the consent of the persons authorized to act under s. 539 of the Civil Procedure Code.[4]

Gift for charitable purposes generally.

A trust for "charitable and pious uses" generally,[5] or "to and amongst the different institutions," to which bequests have been given; "or to any other religious institution as my trustees may think proper,"[6] or for "the poor,"[7] is good. Where a testator directed the residue of his personal estate to be divided for certain charitable purposes mentioned by him, "and other charitable purposes as I do intend to name hereafter," and died without naming any other charitable purposes, it was held, that there was a disposition of the residue in favour of charity, to be carried into effect by the Court, having regard to the objects particularly pointed out by the Court.[8]

Particular purpose failing, where gift is to charity generally.

Where a charitable gift is made for particular purposes which fail, and the gift is to charity generally, the Court will execute the intention of the donor *cy près*. "When," said Lord Brougham,[9] "a testator gives one charitable fund to three several classes of objects, unless he excludes by most express provisions the application of one portion to the purpose to which the others are destined, it is clear that the Court may thus execute his intention in the event of an impossibility of applying that portion to its original destination. The character

[1] Mayor of Lyons *v.* The Advocate-General of Bengal, L. R., 3 I. A., 32.
[2] Attorney-General *v.* St. John's Hospital, L. R., 1 Ch., 92.
[3] Attorney-General *v.* Stewart. L. R., 14 Eq., 17.
[4] *Ibid.* [5] Attorney-General *v.* Herrick, Amb., 712.
[6] Wilkinson *v.* Lindgren, L. R., 5 Ch., 570.
[7] Attorney-General *v.* Rance, cited Ambl., 422.
[8] Mills *v.* Farmer, 1 Mer., 55. *See* Gangabai *v.* Thava Mulla 1 Bom. O. C., 71.
[9] Attorney-General *v.* The Ironmongers Co., 2 M. & K., 586.

of charity is impressed on the whole fund; there is good sense in presuming that, had the testator known that one object was to fail, he would have given its appropriated fund to the increase of the funds destined to the other objects of his bounty; and there is convenience in acting as he would himself have done. This is the foundation of the doctrine of *cy près*." And, therefore, gifts to charities which have ceased to exist at the time of the testator's death,[1] or subsequently fail by reason of the objects of the bounty no longer existing, as where a fund was given for ransoming British slaves in Turkey and Barbary,[2] will be administered *cy près*.[3] So, if a sum is devoted to a charitable purpose, but the particular charity to be benefited is not so described as that it can be ascertained, the Court will direct it to be applied to a charity of a similar nature.[4] Again, where a testator gives a sum of stock to trustees, and shows a clear intention to dispose of the whole of the dividends for the benefit of charitable institutions, and does in fact specify some of them and the yearly sums to be paid to them, but leaves blanks for the names of others and for the sums to be paid to them, the Court will carry out the testator's intention *cy près*, and will frame a scheme for the application of the remaining dividends.[5] Where property was given to the Kent County Hospital, and there was no hospital having precisely that name, it was held, that a general hospital must be presumed to have been intended, and the Kent County Ophthalmic Hospital could not take the legacy; but that it must be divided between two hospitals which together supplied the place of a general county hospital.[6]

Particular charity not described.

In the foregoing cases, the gifts were to charities generally, the fund had the character of charity impressed upon it, and the Court, therefore, carried out the general intention of the testator. But there is another class of cases where the testator has not shown an intention to give to charity generally, but only to benefit some particular charity. And if such object fails, the fund will not be

Failure of object where no intention to give to charity generally.

[1] Hayter *v.* Trego, 5 Russ., 113; Marsh *v.* Attorney-General, 2 J. & H., 61.

[2] Attorney-General *v.* Ironmongers Co., 2 M. & K., 576; Cr. & Ph., 208; 10 C. & F., 908; and see Attorney-General *v.* Glynn, 12 Sim., 84.

[3] *In re* Prison Charities, L. R., 16 Eq., 129; Attorney-General *v.* Hankey, *ib.*, 140 (*n*).

[4] Simon *v.* Barber, 5 Russ., 112. [5] Pieschell *v.* Paris, 2 S. & S., 384.

[6] In *re* Alchin's Trust, L. R, 14 Eq., 230.

LECTURE XII.

applied *cy près*, but there will be an intestacy, and it will fall into the residue. "Now," said Kindersley, V. C.,[1] "there is a distinction well settled by the authorities. There is one class of cases, in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect; if that mode fails, the Court says the general purpose of charity shall be carried out. There is another class in which the testator shows an intention not of general charity, but to give to some particular institution; and then if it fails, because there is no such institution, the gift does not go to charity generally."[2]

Again, if the Court has no power to enforce the execution of the proposed trust, nor to settle a scheme for the administration of the charity *cy près*, there will be an intestacy, and the fund will fall into the residue. Thus, where a testator gave certain funds to the President and Vice-President of the United States, and the Governor of Pennsylvania, upon trust, to build and endow a college for the instruction of youth in the State of Pennsylvania, and directed that moral philosophy should be taught therein, and a professor should be engaged to inculcate and advocate the natural rights of the black people of every clime and country until they be restored to an equality of rights with their white brethren throughout the Union, and the trustees disclaimed the gift, it was held that the trust failed.[3]

A friendly society is not a charitable institution, and therefore the doctrine of *cy près* will not, on the society being voluntarily dissolved, be applied to a bequest made to it in aid of its funds; but the same will fall into the testator's residuary estate.[4]

Apportionment of fund.

If a fund is given to trustees upon trust to divide between certain charities and legatees, and the trustees do not apportion it as directed, the Court will divide it between the charities and legatees equally, on the principle that 'equality is equity.'[5] In *Down* v. *Worrall*,[6] a testator

[1] Clark *v.* Taylor, 1 Drew., 644.

[2] See also Cherry *v.* Mott, 1 M. and Cr., 123; Russell *v.* Kellett, 3 Sm. and G., 264; Langford *v.* Gowland, 3 Giff., 627; Fisk *v.* Attorney-General, L. R., 4 Eq., 521; Clephane *v.* The Lord Provost of Edinburgh, L. R., 1 Sc. App., 417; *In re* Maguire, L. R., 9 Eq., 632.

[3] New *v.* Bonaker, L. R., 4 Eq., 655.

[4] *In re* Clark's Trust, L. R., 1 Ch. Div., 497.

[5] Doyley *v.* Doyley and Attorney-General *v.* Doyley, 7 Ves., 58 (*n*); Izod *v.* Izod, 32 Beav., 242.

[6] 1 M. & K., 561.

gave a fund to trustees, upon trust, to settle such part at their discretion either for pious and charitable purposes or otherwise for the benefit of the testator's sister and her children; and it was held, that this was a personal trust which a representative of the surviving trustee could not execute, and that a sum which remained at the decease of the surviving trustee, and which had not been applied either to charitable purposes or for the benefit of the testator's sister and her children, was undisposed of, and belonged to the testator's next-of-kin. The case, apparently, conflicts with those referred to above. But in *Salusbury* v. *Denton*,[1] Wood, V. C., pointed out that the case was distinguishable, saying, "It is one thing to direct a trustee to give *a part* of a fund to one set of objects, *and the remainder* to another, and it is a distinct thing to direct him to give 'either' to one set of objects, '*or*' to another. *Down* v. *Worrall* was a case of the latter description. There the trustees could give all to either of the objects. This is a case of the former description. Here the trustee was bound to give a part to each."

Where a single fund is given for several charitable objects, and one of them is bad, the principle on which the Court acts is, that if it can be ascertained what are the proper proportions to be attributed to the several objects, it directs an inquiry on the subject; but if from the nature of the gift it appears impracticable to fix the proportions, the Court divides the fund equally between the different objects.[2] So, if a fund is given to be applied to certain charitable objects in certain proportions and the value of the property increases, the accretions will be apportioned among the different objects of the charity *pro ratâ*.[3]

If property is given for the benefit of a particular charity, and subsequently the charity is severed, as in the case of a gift for the repairs of a church in a particular parish, which is afterwards divided into two parishes, the gift cannot be apportioned.[4]

Gift over.

Where a fund is given for charitable purposes with a gift over in case any of the purposes should be void or fail, the gift over is good.[5]

[1] 3 K. & J., 539. [2] Hoare *v.* Osborne, L. R., 1 Eq., 588.
[3] Attorney-General *v.* Marchant, L. R., 3 Eq., 424.
[4] *In re* Church Estate Charity Wandsworth, L. R., 6 Ch., 296.
[5] De Themmines *v.* De Bonnestal, 5 Russ., 288; Hall *v.* Warren, 9 H. L. C., 420.

LECTURE XII.

Charity in foreign country.

A gift to a charity in a foreign country is good, though the Court cannot see to the administration of the charity.[1] In *Mitford* v. *Reynolds*,[2] a testator bequeathed the residue of his estate "to the Government of Bengal, to be applied to charitable, beneficial, and public works, at and in the city of Dacca in Bengal, for the exclusive benefit of the native inhabitants, in such manner as they and the Government might regard as most conclusive to that end," and it was held that the bequest was good.

Breach of trust.

The Court has, in the case of charities, jurisdiction to redress a breach of trust, where the objects of the founder have been prevented or neglected. It has also authority to direct a scheme in order to enforce the more complete attainment of those objects. It has power and authority, when the objects contemplated by the founder cannot be carried into effect, to direct the application of the revenues of the charity to promote objects in accordance with the spirit of the original foundation the actual compliance with which has become impossible. But it has no authority to vary the original foundation and to apply the charity estates in a manner which it conceives to be more beneficial to the public, or even such as the Court may surmise that the founder would himself have contemplated could he have foreseen the changes which have taken place by the lapse of time.[3] For instance, a fund given for purpose of establishing a hospital in a particular town cannot be applied towards lighting and paving the town.[4] So a gift to the poor of a certain parish cannot be given to the poor of another parish.[5] But a gift "for the relief of the poor" may be applied to building a schoolhouse and educating the poor of the parish,[6] or in aid of the poor rates, and so in relief of the parish.[7] So, a gift to be applied towards finding a schoolmaster, and for the pains of such master, may be applied towards rebuilding and repairing the schoolroom and schoolhouse, because these are necessary.[8]

[1] Attorney-General *v.* Sturge, 19 Beav., 597. [2] 1 Ph., 185.
[3] Attorney-General *v.* Sherborne School, 18 Beav., 256.
[4] Attorney-General *v.* Kell, 2 Beav., 575.
[5] Attorney-General *v.* Brandreth, 2 Y. & C. C. C., 200.
[6] Wilkinson *v.* Malin, 2 Tyr., 544.
[7] Attorney-General *v.* Blizard, 21 Beav., 233.
[8] Attorney-General *v.* Mayor of Stamford, 2 Swanst., 592. As to funds given for a particular sect, see Attorney-General *v.* Bance, L. R., 6 Eq., 563; or religious worship, Attorney-General *v.* Pearson, 3 Mer., 400; Foley *v.* Wontner, 2 J. & W., 247.

Mode of procedure to obtain redress.

In England, if the trustees of a charity are guilty of a breach of trust, the mode of obtaining redress is by way of information in the name of the Attorney-General at the instance of some person who is called a 'relator.' The sovereign is *parens patriæ*, and it is the duty of the Attorney-General to see that justice is administered to every subject. Relators need not be personally interested. They are required merely because the Attorney-General, prosecuting a suit in the name of the Crown, would not be liable to costs, and unless some persons were made responsible, proceedings might be instituted very oppressive to individuals.[1]

Civil Procedure Code, s. 539.

In this country the mode of redress is regulated by the Civil Procedure Code,[2] which contains the following provisions:—

"In case of any alleged breach of any express or constructive trust created for public charitable purposes, or whenever the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General acting *ex officio*, or two or more persons having a direct interest in the trust, and having obtained the consent in writing of the Advocate-General, may institute a suit in the High Court or the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree

(*a*) appointing new trustees of the charity;

(*b*) vesting any property in the trustees of the charity;

(*c*) declaring the proportions in which its objects are entitled;

(*d*) authorizing the whole or any part of its property to be let, sold, mortgaged, or exchanged;

(*e*) settling a scheme for its management; or granting such further or other relief as the nature of the case may require.

The powers conferred by this section on the Advocate-General may, outside the Presidency-towns, be exercised also by the Collector or by such officer as the Local Government may appoint in this behalf."

The Advocate-General is not a necessary party to a suit brought by the managers of the temples and endowments of a particular sect, to have a will bequeathing property for the purposes of the temples and endowments construed, for a declaration of the plaintiffs' rights, and to have

[1] Lewin, 7th Edn., 790

[2] Act X of 1877, s. 539, as amended by Act XII of 1879, s. 82.

LECTURE XII.

property dedicated by the will to religious purposes ascertained and secured, though it is desirable that such suits should be brought only with his consent or by leave of the Court.[1]

Worshippers or devotees of an idol are entitled to bring a suit, complaining of a breach of trust with reference to the funds or property belonging to the idol or appendant to its temple. But it is doubtful whether this section is applicable to the *devasthán* of an idol or temple, dedicated merely to the purposes of such idol or temple.[2]

The representatives of a testator who has created trusts for religious or charitable purposes, in which the representatives are not personally interested, may institute proceedings to have abuses in the trust rectified, there being no officer in this country who has such power of enforcing the due administration of religious or charitable trusts by information at the relation of some private individual as is possessed by the Attorney-General in England.[3] Such a suit should not be admitted unless the plaintiff gives security for costs.[4]

The *Vatandar Joshi* of a village has the right to recover pecuniary damages from a person who has intruded upon his office and received fees properly payable to him. But the Court will not grant any injunction against such intruder, which would have the effect of forcing upon any section of the community the services of a priest whom they are unwilling to recognize, and forbidding them to employ a priest whom they are willing to recognize, and forbidding them to employ a priest whose ministrations they desire.[5]

Liability of trustees to account.

Trustees of charities must account in the same manner as ordinary trustees. Limitation will not run against them in the case of an express trust.[6] But the misapplication of the funds may have been going on a great length of time, and then the Court may set a limit to the period over which the account is to be taken. "It does not follow,"

[1] Panchcowrie Mull *v.* Chumroolall, I. L. R., 3 Calc., 563. See also Advocate-General *v.* Vishvanath Atmaram, 1 Bom., Appx., ix. As to costs of the Attorney-General upon making an application in the matter of a charity, see *In re* Dulwich College, L. R., 15 Eq., 294.

[2] Radhabai Kom Chimnaji Sali *v.* Chimnaji Bin Ramji Sali, I. L. R., 3 Bomb., 27.

[3] Brojomohun Doss *v.* Hurrololl Doss, I. L. R., 5 Calc., 750.

[4] *Ibid.*

[5] Rajah Valad Shivapa *v.* Krishna Chat, I. L. R., 3 Bom., 232.

[6] See *ante*, p. 186.

said Sir T. Plumer, M. R.,[1] "that relief will be given after a great length of time, it being the constant course of Courts of Equity to discourage stale demands. Even in cases of fraud, in which, if recent, there would have been no doubt, lapse of time has induced the Courts to refuse their interference. In case of charities, this principle has often been acted on when there has been a long period during which a party has, under an innocent mistake, misapplied a fund from the laches and neglect of others,—that is, from no one of the public setting him right; and when the accounts have in consequence become entangled, the Court, under its general discretion, considering the enormous expense of the enquiries, the great hardship of calling upon representatives to refund what families have spent, acting upon the notion of its being their property, has been in the habit, while giving relief, of fixing a period to the account."[2]

Contemporaneous usage may be referred to, and the Court will not assume a long series of breaches of trust to have been committed.[3]

If the trustees have been acting under a mistake, the Court will not call back any disbursements made before the commencement of the proceedings, or before the trustees had notice that their dealings were to be examined into.[4]

New trustees.

If the instrument creating a charitable trust does not contain provisions for the appointment of new trustees, the Court will direct an inquiry as to who are proper persons to be appointed, and will make the appointment.[5]

New trustees of society for maintaining religious worship.

The "Religious Societies Act of 1880"[6] provides,[7] that "when any body of persons associated for the purpose of maintaining religious worship has acquired, or hereafter shall acquire, any property, and such property has been, or hereafter shall be, vested in trustees in trust for such body, and it becomes necessary to appoint a new trustee in the place of, or in addition to, any such trustee or any trustee appointed in the manner hereinafter prescribed, and no manner of appointing such new trustee is prescribed by any instrument by which it was so vested, or by which the trusts on which it is held have been declared, or such new

[1] Attorney-General v. Mayor of Exeter, Jac., 448.
[2] Attorney-General v. Sidney Sussex College, L. R., 4 Ch., 722.
[3] As to the periods for which the account may be carried back, see Lewin, 7th Edn., 798.
[4] See Lewin, 799.
[5] Davis v. Jenkins, 3 V. and B., 151.
[6] Act I of 1880.
[7] Section 2.

LECTURE XII.

trustee cannot for any reason be appointed in the manner so prescribed, such new trustee may be appointed in such manner as may be agreed upon by such body, or by a majority of not less than two-thirds of the members of such body actually present at the meeting at which the appointment is made."

Memorandum of appointment.

Section 3 provides, that the appointment shall be recorded in a memorandum under the hand of the Chairman, and registered.

Vesting.

Section 4 provides, that "when any new trustees have been appointed, whether in the manner prescribed by any such instrument as aforesaid, or in the manner hereinbefore provided, the property subject to the trust shall forthwith, notwithstanding anything contained in any such instrument, become vested, without any conveyance or other assurance, in such new trustees and the old continuing trustees jointly, or if there are no old continuing trustees, in such new trustees solely, upon the same trusts and with and subject to the same powers and provisions, as it was vested in the old trustees." And s. 5 saves any existing modes of appointment and conveyance.

Appointment of Official Trustee to charitable trust.

The Official Trustees' Act[1] provides, that "if any person shall be about to grant, assign, or settle any property, moveable or immoveable, of what nature or kind soever, upon or subject to any trust, whether for a charitable purpose or otherwise, it shall be lawful for such person, with the consent of the Official Trustee, to appoint him, by the deed creating the trust, to be the trustee of such settlement; and upon such appointment the property so granted, assigned, or settled shall vest in such officer and his successors in office, and shall be held by him and them upon the trust declared and contained in the said deed. Provided always, that the consent of the Official Trustee shall be recited in the said deed, and that the deed shall be duly executed by the Official Trustee: provided also, that no trust for any religious purpose shall ever be held by the Official Trustee, under this or any other section of this Act."

And s. 10 of the Act provides, that "if any property is subject to a trust, whether for a charitable purpose or otherwise, and there shall be no trustee willing to act or capable of acting in the trusts thereof, who is within the

[1] XVII of 1866, s. 8.

local limits of the ordinary or extraordinary original civil jurisdiction of the High Court, or if property is subject to a trust, and all the trustees, or the surviving or continuing trustee, and all the persons beneficially interested in the said trust shall be desirous that the Official Trustee shall be appointed in the room of such trustees or trustee, then, and in any such case, it shall be lawful for the High Court, on petition, and with the consent of the Official Trustee, to appoint the Official Trustee to be the trustee of such property: and upon such appointment such property shall vest in the Official Trustee and his successors in office, and shall be held by him and them upon the same trusts as the same were held previous to such appointment."

Vesting property in trustees of charity.

Section 45 of the Trustee Act[1] provides, that, in cases to which English law is applicable, "it shall be lawful for the High Court to exercise the powers herein conferred for the purpose of vesting any immoveable property, stock, Government securities, or thing in action, in the trustee or trustees of any charity or society, over which charity or society the High Court would have jurisdiction upon suit duly instituted, whether such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court, or by order made upon a petition to the said Court."

Visitors.

When a charity has been established by charter, the visitors are the founder and his heirs,[2] and failing them, the Crown.[3]

Controlling revenues of charity.

It is the duty of the visitors to regulate and control the management of the charity. And with this duty the Court will not interfere, though it will interfere with the management of the revenues of the charity. "There is nothing better established," said Lord Commissioner Eyre,[4] "than that this Court does not entertain a general jurisdiction or regulate and control charities established by charter. There the establishment is fixed and determined; and the Court has no power to vary it. If the governors established for the regulation of it are not those who have the management of the revenue, this Court has no

[1] XVII of 1866.
[2] Attorney-General v. Gaunt, 3 Sw., 148 (n).
[3] Attorney-General v. Dixie, 13 Ves., 519, 533; *In re* Queen's College, Cambridge, Jac., 1.
[4] Attorney-General v. Governors of the Foundling Hospital, 2 Ves. J., 47.

LECTURE XII.

jurisdiction; and if it is ever so much abused, as far as respects the jurisdiction of this Court, it is without remedy; but if those established as governors have also the management of the revenues, this Court does assume a jurisdiction of necessity, so far as they are to be considered as trustees of the revenue. The result is, this Court must not hastily take upon itself to interfere with those who have by charter, or by Act of Parliament, the whole control over the charity. But where, having also the management of the revenues, they are abusing their trust, the Court has jurisdiction."[1] "As to the revenue it is quite clear," said Lord Eldon,[2] "that where there is a local visitor as to the conduct and management of the school if in the original instrument a trust is expressed as to the application of the revenue, this Court has jurisdiction to compel a due application."[3] "Where there is a clear and distinct trust," said Romilly, M. R.,[4] "this Court administers and enforces it as much where there is a visitor as where there is none. This is clear, both on principle and authority. The visitor has a common law office and common law duties to perform, and does not superintend the performance of the trust which belongs to the various officers which he may take care to see are properly kept up and appointed. It is the duty of the Court to see that the trusts are properly performed, notwithstanding that there may be a special or a general visitor."

Subsequent gift.

If a subsequent donor gives property to the charity without a declaration of a special trust, it will fall under the general Statutes and rules of the charity, and be regulated with the rest of its property.[5]

Purchaser without notice from purchaser with notice.

The rule that a purchaser without notice from a purchaser with notice of a breach of trust is not liable, does not apply in the case of a charity, and in such a case the purchaser is bound by the claim of the charity. In other respects the principles of equity as to the doctrine of notice are applicable to charities in the same manner as between private persons.[6]

[1] And see Attorney-General *v.* Magdalen College, 10 Beav., 402; Attorney-General *v.* Archbishop of York, 2 R. & M., 461.
[2] *Ex parte* Berkhampstead Free School, 2 V. & B., 138.
[3] And see Attorney-General *v.* Browne's Hospital, 17 Sim., 156.
[4] 17 Beav., 466.
[5] Green *v.* Rutherforth, 1 Ves., 473.
[6] Lewin, 7th Edn., 750.

LECTURE XII.

Alienation of charity estates.

Trustees of charities in England could not, before the restrictions which have been imposed upon them by Statute, have made an absolute disposition of the trust-estate. But there was no positive rule, that in no instance could an absolute disposition be made, for then the Court itself could not have authorized such an act—a jurisdiction which it is acknowledged has, from time to time, been exercised in special cases. "I do not doubt," said Wigram, V. C.,[1] "of the existence of this power in the Court: the trustees have the power to sell at law, they can convey the legal estate, but it is only a Court of Equity that can recall the property, and if that Court should sanction a sale, it would be bound to protect the purchaser." The true principle was, that an absolute disposition was then only to be considered a breach of trust when the proceeding was inconsistent with a provident administration of the estate for the benefit of the charity. And the transaction was strongly assumed to be improvident as against a purchaser until he had established the contrary.[2] The principles above stated apply here, as the Charity Acts are not extended to this country.

Religious trusts among Hindus.

Among Hindus, property of every kind may be dedicated to religious and charitable purposes, whether by gift *inter vivos*, or by will;[3] and such dedications of property do not require the assent of the State.[4] Except in families governed by the Mitakshara law, there is no limit to the amount of property which may be dedicated; in one case all the family property was permitted to be applied to the support and worship of the family idol.[5] According to Hindu law as current in Bengal, the gift of joint and undivided property for religious and charitable purposes to the extent of the donor's share is valid.[6] And under the Mitakshara law, a father may give a small portion of the ancestral estate for pious purposes without the consent of the sons.[7]

[1] Attorney-General *v.* Mayor of Newark, 1 Hare, 400.

[2] See Lewin, 7th Edn., 491.

[3] Mayne, § 359: and see Ramtonoo Mullick *v.* Ramgopal Mullick, 1 Kn., 245; Sonatun Rysack *v.* S. M. Juggut Soondree Dossee, 8 Moo. I. A., 66.

[4] Juggut Mohini Dossee *v.* M. S. Sokhee Money Dossee, 14 Moo. I. A., 302.

[5] Radhabullub Tagore *v.* Gopee Mohun Tagore, 1 Morley's Dig., 550.

[6] Komlakant Ghosal *v.* Ram Hurree Nund Gramee, 4 Sel., 196.

[7] Gopal Chand Pande *v.* Babu Kunwar Singh, 5 Sel., 24.

LECTURE XII.

Perpetuities.

A gift to charitable or religious purposes forms an exception to the general rule against perpetuities. "It being assumed to be a principle of Hindu law that a gift can be made to an idol, which is a *caput mortuum* and incapable of alienating, that principle cannot be broken in upon by engrafting upon it the English law of perpetuities."[1] But the rule against perpetuities cannot be avoided by means of a colourable gift to an idol. Thus, where a Hindu, by will, devised certain property consisting of a family dwelling-house and land, to trustees for ever, for the residence, maintenance, and performance of the worship of certain family idols, and appointed his sons and their descendants in the strict male line to be *sebaits* of the idols for ever, making provision for their residence in the family dwellinghouse; and the will also contained a clause restraining any partition, division, or alienation of the property so dedicated to the worship of the idols; and the testator appointed the trustees executors of his will, and by a codicil bequeathed certain legacies to various members of his family,—it was held, that the devise to idols was void and inoperative, as being a settlement in perpetuity on the male descendants of the testator and for their use, and not a real dedication for the worship of the idols.[2]

Colourable gift to idol.

Gift must be certain.

The principle of English law, that a gift for charitable or religious purposes must be certain,[3] applies in construing the will of a Hindu. Where a testator by his will directed as follows:—"I do hereby direct my trustee to feed the really needy and poor at Gopeenathjee out of a separate expense out of my estate, to be contributed to the worship of Luckheejonardunjee, my ancestral goddess: I do direct my trustee to spend suitable sums for the annual shradhs, or anniversaries, of my father, mother, and grandfather, as well as of myself after my demise; for the performance of the ceremonies and the feeding of the Brahmins and the poor; to spend suitable sums for the annual contribution and gifts to the Brahmins, pundits holding *tolls* for learning in the country at the time of the Doorga Poojah; to spend suitable sums for the

[1] Kumara Asima Krishna Deb, 2 B. L. R., O. C., 47, *per* Markby, J. See also Jatindra Mohan Tagore *v.* Ganendra Mohan Tagore, 9 B. L. R., 377; Krishnaramini Dasi *v.* Anandakrishna Bose, 4 B. L. R., O. C., 231; Rajender Dutt *v.* Sham Chund Mitter, I. L. R., 6 Calc., 106.

[2] Promotho Dossee *v.* Radhika Persaud Dutt, 14 B. L. R., 175; and see Chundramoney Dossee *v.* Motilal Mullick, 5 Calc., 496.

[3] See *ante*, p. 355.

perusal of Mohabarat and Pooran, and for the prayer of God during the month of Kartick: should there be any surplus after the above expenditure, then I do direct my trustee to spend the said surplus in the contribution towards the marriage of the daughters of the poor in my class and of the poor Brahmins, and towards the education of the sons of the poor amongst my class, and of the poor Brahmins, and other respectable castes, as my trustee will think fit to comply,"—it was held to be doubtful whether the bequests to pundits holding *tolls* and for the reading of the Mohabarat and Pooran and for prayer to God were valid.[1]

Gifts to religious or charitable uses by Oudh taluqdars.

Section 105 of the Indian Succession Act, which imposes certain restrictions on gifts for religious and charitable purposes,[2] does not extend to Hindus. But the "Oudh Estates Act, 1869,"[3] limits, to a certain extent, the powers of taluqdars or grantees in Oudh of disposing of their property for charitable purposes. Section 18 provides, that no taluqdar or grantee, and no heir or legatee of a taluqdar or grantee, shall have power to give his estate, or any portion thereof, or interest therein, to religious or charitable uses except by an instrument of gift executed not less than three months before his death, and subject to the provisions contained in s. 17.

And s. 20 of the same Act provides, that "no taluqdar or grantee, and no heir or legatee of a taluqdar or grantee, having a child, parent, brother, unmarried sister, or a nephew, being the naturally-born son of a brother of such taluqdar or grantee, heir or legatee, shall have power to bequeath his estate or any part thereof, or any interest therein, exceeding in amount or value the sum of two thousand rupees, to religious or charitable uses, except by a will executed not less than three months before his death, and registered within one month from the date of its execution."

Tenure in trustee.

"As an idol cannot itself hold lands, the practice is to vest the lands in a trustee for the religious purpose, or to impose upon the holder of the lands a trust to defray the expense of the worship.[4] Sometimes the donor is himself the trustee. Such a trust is of course valid, if

[1] Dwarka Nath Bysack *v.* Burroda Persaud Bysack, I. L. R., 4 Calc., 443. See also Gangabai *v.* Thava Mulla, 1 Bom., O. C., 71.

[2] See *ante*, p. 352. [3] Act I of 1869.

[4] See Komlakant Ghosal *v.* Ram Hurree Nund Gramee, 4 Sel., 196.

LECTURE XII.

perfectly created, though, being voluntary, the donor cannot be compelled to carry it out if he has left it imperfect.[1] But the effect of the transaction will differ materially, according as the property is absolutely given for the religious object or merely burthened with a trust for its support. And there will be a further difference where the trust is only an apparent, and not a real one, and where it creates no rights in any one except the holder of the fund."[2]

Trust imperfect.

"The last case arises where the founder applies his own property to the creation of a pagoda, or any other religious or charitable foundation, keeping the property itself, and the control over it, absolutely in his own hands. The community may be greatly benefited by this arrangement so long as it lasts, but its continuance is entirely at his own pleasure. It is like a private chapel in a gentleman's park, and the fact that the public have been permitted to resort to it, will not prevent its being closed, or pulled down, provided there has been no dedication of it to the public."[3] Thus, where two Parsi brothers erected a fire-temple on their estate, and by a document, which they recorded in a solemn meeting of their community, declared that they erected this temple, and placed the sacred fire in it, in commemoration of their deceased father, but that it should always be subject to the authority of themselves and their heirs, and that all the members of the Zoroastrian community were at liberty to have their religious ceremonies performed therein without any obstruction on their part,—it was held, that this document contained no grant of the temple to the Parsi community, but that the entire ownership remained in the brothers, and would pass to their assignees in case of insolvency.[4] So, where the plaintiff sued, as the *shebait* of a certain idol, to recover possession of a zemindari, by setting aside an alienation of it effected by an ancestor, on the ground that it was *debuttur* property and inalienable; and it appeared that the property in dispute was purchased by the grandfather of the plaintiff in the name of the idol, which was set up merely for his private worship in his own house, without any priests to perform regularly any religious service for the public benefit of Hindus; and that the property had been dealt with all along as his own private

[1] *Ante*, p. 53. [2] Mayne, § 362. [3] Mayne, § 363.
[4] *Doe d.* Howard *v.* Pestonji Manockji, Perry, O. C., 535.

property,—it was held, that it was a mere nominal endowment, and that the alienation was not invalid.[1]

Devise subject to trust.

Property may be devised partially subject to a trust in favour of an idol or for some religious or charitable endowment. Thus, where a Hindu, by his will, gave all his moveable and immoveable property to his family idol, and, after stating that he had four sons, he directed that his property should never be divided by them, their sons or grandsons in succession, but that they should enjoy "the surplus proceeds only;" and the will, after appointing one of the sons manager to the estate, to attend to the festivals and ceremonies of the idol and to maintain the family, further directed, that whatever might be the surplus after deducting the whole of the expenditure, the same should be added to the corpus, and in the event of a disagreement between the sons and family, the testator directed that, after the expenses attending the estate, the idols, and maintenance of the family, whatever nett produce and surplus there might be should be divided annually, in certain proportions, between the members of the family,—it was held, that the bequest to the idol was not an absolute gift, but was to be construed as a gift to the testator's four sons and their offspring in the male line as a joint family, so long as the family remained joint, and that the four sons were entitled to the surplus of the property after providing for the performance of the ceremonies and festivals of the idol and the provisions in the will for maintenance.[2] Again, where a Hindu lady left, by will to her sons, land belonging to her to support the daily worship of an idol, and to defray the expenses of certain other religious ceremonies, with a provision that, in the event of there being a surplus after these uses had been satisfied out of the revenue of the lands, such surplus should be applied to the support of the family,—it was held, that this provision amounted to a bequest of the surplus to the members of the joint family for their own use and benefit, and that each of the sons of the testatrix took a share in the property, which, after satisfying the religious and ceremonial trusts, might be considerable and could not be presumed to be valueless.[3]

[1] Maharanee Brojosoondery Debia *v.* Ranee Luchmee Koonwaree, 15 B. L. R., 176 (*n*).

[2] Sonatun Bysack *v.* S. M. Juggut Soondree Dossee, 8. Moo. I. A., 66. See also Ram Coomar Paul *v.* Jogender Nath Paul, I. L. R., 4 Calc., 56.

[3] Ashutosh Dutt *v.* Doorga Churn Chatterjee, I. L. R., 5 Calc., 438.

LECTURE XII.

Sale of property subject to trust.

Where property is wholly dedicated to religious purposes, it cannot be sold; but where a portion only of its profits is charged for such purposes, the property may be sold subject to the charge with which it is burdened.[1] So, where an endowment is merely nominal, and indications of personal appropriation and exercise of proprietary right are found, a sale of the property is valid under the Hindu law.[2]

Partition subject to trust.

In such cases as these we are now considering, the property may be partitioned subject to the trust for the idol.[3]

Alienation.

Although property devoted to religious purposes is, as a rule, inalienable, a *shebait* may alienate a reasonable portion of the endowed property if the alienation is absolutely required by the necessities of the management, such as the restoration of the idol or the repair of the temple;[4] and he may raise the necessary funds by mortgage.[5] But he may not, except distinctly for the benefit of the endowment, incumber it beyond his own life.[6] His position, so far as alienation is concerned, is analogous to that of the manager of an infant heir, or of a Hindu widow alienating ancestral property; and the question to be considered is, whether, looking to all the circumstances of the case, the alienation was a prudent and wise act in respect of the purposes for which he was *shebait;* and, in estimating the validity of a sale, it ought to be considered whether the purchasers satisfied themselves, as far as they could, that there was a fair and sufficient ground of necessity for the alienation.[7] The *shebait* may grant leases of the endowed lands;[8] and he can create derivative tenures and estates conformable to usage.[9] But a *mohunt* in charge of an endowment, with only a life-interest in the property, cannot create an interest superior to his own, or, except under the most extraordinary pressure, and for the distinct benefit of the

[1] Basoo Dhul *v.* Kishen Chunder Geer Gossain, 13 W. R., 200.

[2] Mahtab Chand *v.* Mirdad Ali, 5 Sel. Rep., 268. See also Sonatun Bysack *v.* S. M. Juggut Soondree Dossee, 8 Moo. I. A., 66.

[3] Ram Coomar Paul *v.* Jogender Nath Paul, I. L. R., 4 Calc., 56.

[4] Tahboonissa Bibee *v.* Koomar Sham Kishore Roy, 15 W. R., 228.

[5] Prosunno Kumari Debya *v.* Golab Chand Baboo, L. R., 2 I. A., 145.

[6] Khusalchand *v.* Mahadevgiri, 12 Bom., 214.

[7] Juggessur Buttobyal *v.* Rajah Roodro Narain Roy, 12 W. R., 299. Naryan *v.* Chintaman, I. L. R., 5 Bomb., 393; Koonwar Doorganath Roy *v.* Ram Chunder Sen, I. L. R., 2 Calc., 341; S.C., L. R., 4 I. A., 52.

[8] *Ibid;* and see Arruth Misser *v.* Juggurnath Indraswamee, 18 W. R., 439.

[9] Maharanee Shibessouree Debia *v.* Mothooranath Acharjo, 13 Moo. I. A., 270.

endowment, bind his successors in office.[1] In a suit to set aside certain alienations of an ancestral mehal, on the ground that the mehal had been dedicated to the worship of an idol, it was contended for the defence, that the estate had not been so dedicated, and that, if it was, there was legal necessity for the alienation. The deeds of transfer contained recitals that the estate transferred was *debuttur*, that the temple was out of repair, and that the purchase-money was wanted to restore it. It was held, that the admissions in the deeds must be taken as a whole, and that, according to them, the sales were justifiable, even if the property were *debuttur;* and that, even if part only of the purchase-money was required for the repairs of the idol, as was represented to have been so required, and this was *bonâ fide* believed by the grantees, the deeds would not be wholly void by reason that some of the money was raised for another purpose.[2]

Evidence of endowment to be given.

A plaintiff, who seeks to set aside an alienation of lands on the ground that they are dedicated in perpetuity to support the worship of an idol, must give strong and clear evidence of the endowment. The mere fact that the rents of a particular mehal have been applied for a considerable period to the worship of an idol, is not sufficient proof that the mehal is *debuttur*.[3]

How far sale set aside.

Even if a purchaser has notice on a sale of property avowedly *debuttur*, that the whole of the purchase-money is not required for the purposes of the endowment, but that part of it is to be expended on other objects, an action will not lie to set aside the sale altogether, since the purchaser would be entitled to be reimbursed so much of the money as has been legitimately advanced.[4]

Trustee may not benefit by sale.

Upon the principle that a trustee may not derive any benefit from the trust,[5] the trustees of endowed property cannot transfer it so as to gain any benefit to themselves, even though the transferree undertakes to continue the ceremonies.[6]

[1] Mohunt Burm Suroop Dass *v.* Khashee Jha, 20 W. R., 471; Bunwaree Chand Thakoor *v* Mudden Mohun Chuttoraj, 21 W. R., 41; Radha Bullub Chand *v.* Juggut Chunder Chowdhree, 4 Sel., 151.

[2] Koonwar Doorganath Roy *v.* Ram Chunder Sen, I. L. R., 2 Calc., 341; S. C., L. R., 4 I. A., 52.

[3] Koonwar Doorganath Roy *v.* Ram Chunder Sen, I. L. R, 2 Calc., 341; S. C., L. R., 4 I. A., 52.

[4] *Ibid.* [5] See *ante*, p. 250.

[6] Rajah Vurmah Valia *v.* Ravi Vurmah Mutha, L. R., 4 I. A., 76.

LECTURE XII.

Sale of turn of worship.

The right to the turn of worship of a Hindu idol cannot be sold in execution of a decree for the personal debt of the *shebait*. It might happen that the purchaser was of a different religion and not capable of performing the services, and the object of the endower in creating the endowment would be defeated.[1]

Succession to trusteeship.

When property is endowed for charitable or religious purposes, it is usual to appoint some person, who may be a female,[2] to manage the estate and to make provision for succession to the office. If no such provision is made, and there is no evidence of succession by any usage or custom, the heirs of the endower are entitled to the management. In the case of *The elder widow of Raja Chutter Sein* v. *The younger widow of Raja Chutter Sein*,[3] the Pundits of the Sudder Dewany Adawlut gave the following opinions on the question as to the right to manage *debuttur* property :—" *Debuttur* lands are not heritable property ; the management of them, alone, for religious purposes, devolves on the heirs of the person who made the endowment."[4] The principle is, that an estate given to a man simply without express words of inheritance, will, in the absence of a conflicting context, carry by Hindu law (as under the present state of the law it does by will in England) an estate of inheritance.[5]

Where a testator had made a bequest for charitable purposes, and had made no express provision for the management of the trust, except by directing that, in the event of his heirs failing to carry out his wishes in respect of the trust-fund, the Civil Court should take the fund and the management of the trust summarily into its own hands, it was held, that, in the absence of misconduct, the widow, and not the Collector, was the proper person to be appointed trustee.[6]

Enjoyment of endowed property.

The right to the enjoyment of the endowed property passes with the office, and is not separable from it ; and if

[1] Kalee Gir Gossain *v.* Bungshee Mohun Doss, 15 W. R., 339.

[2] Joy Deb Surmah *v.* Huroputty Surmah, 16 W. R., 282.

[3] 1 Sel. Rep., 189.

[4] And see Jaafar Mohi-u-din Sahib *v.* Aji Mohi-u-din Sahib, 2 Mad. H. C. R., 19.

[5] Jatindra Mohan Tagore *v.* Ganendra Mohan Tagore, 9 B. L. R., 377, 395 ; S. C. in the Court below, 4 B. L. R., O. C., 103, 182.

[6] Hori Dasi Dabi *v.* The Secretary of State for India, I. L. R., 5 Calc., 228 ; S. C. *nom.* Ramlall Mookerjee *v.* The Secretary of State for India, I. L. R., 7 Calc., 225.

some particular member of a family is designated as the incumbent of the office, the other members of the family have no right to a division of the returns derived from the land.[1]

Turn of worship.

In some cases the members of the family may be entitled to manage in turns, and any infringement of this right can be redressed by a suit.[2] The Court should define the precise periods for which the parties are entitled.[3] A refusal to give up an idol, in consequence of which the person demanding it is prevented from performing his turn of worship on a specified date, gives the party aggrieved a right to sue for damages.[4]

Limitation.

The right to the exclusive worship of an idol is not in the nature of an interest in immoveable property, and a suit to establish such a right must be brought under Act XV of 1877, sched. ii, art. 120, within six years from the time when the right to sue accrued. A suit to establish a right to a turn of worship is one "to establish a periodically recurring right," and must be brought under art. 131 of the same Act within three years of the time when the plaintiff is first refused the enjoyment of the right.[5]

Management vested in different persons.

If the person creating the endowment has vested the management in several different persons, each of whom is to act in the management, and to be a check on the others, the managers appointed cannot assign over the right of management to any particular person, and so alter the nature of the trust.[6]

Proof of succession.

The succession to *muths*, or religious endowments, must be regulated in each case by the nature of the endowment, and the rule of succession prescribed by the founder of the institution; and if this rule cannot be discovered from the original deed of gift or other documentary evidence, it must be proved in each case by showing what the usage has been on the occasion of each succession.[7]

[1] Jaafar Mohi-u-din Sahib *v.* Aji Mohi-u-din Sahib, 2 Mad. H. C. R., 19.

[2] Anund Moyee Chowdhrain *v.* Boykant Nath Roy, 8 W. R., 193; Ram Soondur Thakoor *v.* Taruck Chunder Turkoruttun, 19 W. R., 28; Mitta Kunth Audhicarry *v.* Neerunjun Audhicarry, 14 B. L. R., 166.

[3] Ram Soondur Thakoor *v.* Taruck Chunder Turkoruttun, 19 W. R., 28; Mitta Kunth Audhicarry *v.* Neerunjun Audhicarry, 14 B L. R., 170.

[4] Debendro Nath Mullick *v.* Odit Churn Mullick, I. L. R., 3 Calc., 390. As to obtaining a declaration of the right to act as *pujari*, and to receive the proceeds of a *mandir*, see Pranshankar *v.* Prannath Mahanand, 1 Bom., A. C., 12.

[5] Eshan Chunder Roy *v.* Monmohini Dassi, I. L. R., 4 Calc., 683; see also Gaur Mohan Chowdhry *v* Madan Mohan Chowdhry, 6 B. L. R., 352.

[6] Rajah Vurmah Valia *v.* Ravi Vurmah Mutha, L. R., 4 I. A., 76.

[7] Sitapershad *v.* Thakur Dass, 5 Calc., 73.

LECTURE XII.

Succession where manager bound to celibacy.

Where the person appointed to manage an endowment is bound to celibacy, he is usually succeeded by one of his disciples, whom he may nominate in his own lifetime,[1] or by will.[2] But he cannot alter the succession of an endowment belonging to ascetics, by any act of his own in connection with the status under which he originally acquired the trust.[3] There are instances of *muths* in which the mohuntship descends to a personal heir of the deceased, and others in which the existing *mohunt* alone nominates his successor; but the ordinary rule is, that the *muths* of the same sect in a district are associated together—the *mohunts* of these acknowledging one of their number (who is for some reason pre-eminent) as a head; and on the occasion of the death of one, the others assemble to elect a successor out of the *chelas* or disciples of the deceased, if possible; or if there be none of them qualified, then from the *chelas* of another mohunt. After the election the chosen disciple is installed in the guddi of his predecessor.[4]

On a claim for the superintendence of an endowment no acknowledgment by any party can do away with the necessity of proof of due nomination according to the rules and usages of the endowment.[5]

In some cases one member of an order of ascetics who has been associated with a *shebait* succeeds to the office. The principle upon which such succession is allowed, is based entirely upon fellowship and personal association with that other, and a stranger, though of the same order, will be excluded.[6]

In the case of a *mourosi muth*, the investiture by the leading neighbouring *mohunts* at the Bandhara ceremony of one who cannot prove that he was actually appointed by the last mohunt, is not sufficient, in the absence of proof that he has a right to be so appointed as being senior *chela* of the last mohunt, to entitle him to succeed to the *guddi*.[7]

[1] Local Agents of Zillah Hooghly *v.* Kishnanund Dundee, S. D. of 1848, p. 253.
[2] Greedharee Doss *v.* Nundokissore Doss, 11 Moo. I. A., 405.
[3] Mohunt Rumun Dass *v.* Mohunt Ashbul Dass, 1 W R., 160.
[4] Gossain Dowlut Geer *v.* Bissessur Geer, 19 W. R., 215.
[5] Mohunt Gopal Dass *v.* Mohunt Kerparam Dass, S. D. of 1850, p. 250.
[6] Khuggender Narain Chowdhry *v.* Sharupgir Oghorenath, I. L. R., 4 Calc., 543.
[7] Sitapershad *v.* Thakur Dass, 5 Calc., 73.

A zemindar, claiming a customary right to grant confirmation of the election of a *mohunt*, must prove the custom.[1]

Among *saniasis* generally, no *chela* has a right as such to succeed to the property of his deceased *guru*. His right of succession depends upon his nomination by the deceased in his lifetime as his successor, which nomination is generally confirmed by the *mohunts* of the neighbourhood assembled together to perform the funeral obsequies of the deceased. Where a *guru* does not nominate his successor from among his *chelas*, such successor is elected and installed by the *mohunts* and principal persons of the sect in the neighbourhood, upon the occasion of the funeral obsequies of the deceased. Where, therefore, a *chela* sued for possession of a village belonging to his deceased *guru*, founding such suit on his right of succession as *chela*, without alleging that he had been nominated by the deceased as his successor and confirmed, or that he had been elected as successor to the deceased, the suit was held not to be maintainable.[2]

Reversion.

If a *shebait* dies without having appointed a successor, the managership reverts to the heirs of the person who endowed the property.[3]

Removal of trustee.

Unless the founder has reserved to himself some special powers of supervision, removal, or nomination, neither he nor his heirs have any greater power in this respect than any other person who is interested in the trust.[4]

Removal of mohunt.

Where, by his will, the *mohunt* of an *akra*, or religious endowment, appointed *A* to be the *malik* of the properties comprised in the endowment, and to receive the dues and pay the debts, and to do everything necessarily connected therewith; and provided that if any act was done prejudicial to any of those purposes or to any property set apart therefor, or contrary to the Hindu practice and religion or usages, the property should vest in such disciple of his who should be competent and virtuous, and *A* obtained probate of the will and entered upon the properties mentioned in it,—it was held, that the Court had no power to revoke the probate under s. 234 of the

[1] Rajah Muttu Ramalinga Setupati *v.* Perianayagum Pillai, L. R., 1 I. A., 209.

[2] Madho Dass *v.* Kamta Dass, I. L R.. 1 All.. 539.

[3] M. S. Jai Bansi Kunwar *v.* Chattar Dhâri Sing, 5 B. L. R., 181.

[4] Mayne, § 365.

LECTURE XII.

Succession Act, upon the ground that *A* had, since he took charge of the office, taken to an immoral course of conduct, and in consequence had been excluded from the community of *mohunts;* but that the proper course was to proceed under the Religious Endowments Act, I of 1880.[1]

Religious trust irrevocable.

A trust for religious or charitable purposes, when once properly created, is, like an ordinary trust, wholly irrevocable by the grantor.[2]

Execution of trust.

If the objects for which an endowment was created are not carried out, the property cannot be resumed by the heir of the founder,[3] but the Court becomes the trustee, and will consider in what form and manner the trust is to be executed.[4]

The superintending authority over religious endowments exercised by the old rulers of the country passed to the British Government, and the Regulations and Statutes which have, from time to time, been passed with regard to such endowments merely define the manner in which that power was thenceforth to be exercised.[5]

Principles to be followed.

The important principle to be observed by the Courts in dealing with the constitution and rules of religious brotherhoods attached to Hindu temples is to ascertain, if possible, the special laws and usages governing the particular community whose affairs have become the subject of litigation, and to be guided by them. The custom and practice in such matters is to be proved by testimony.[6]

Right to erect place of worship.

Members of any sect are at liberty to erect a place of worship, either public or private, on their own property, although it is more or less contiguous to a place already occupied by a place of worship appertaining to another sect; and to perform worship, provided that they do not cause material annoyance to their neighbours.[7]

Religious trusts among Mahomedans.

Religious and charitable endowments may be created by

[1] *In re* Mohun Dass, I. L. R., 6 Calc., 11; see Appendix for the Act.

[2] Juggut Mohini Dossee *v.* M. S. Sokheemoney Dossee, 14 Moo. I. A., 289, 302.

[3] Ram Narain Singh *v.* Ramoon Paurey, 23 W. R., 76.

[4] Attorney-General *v.* Brodie, 4 Moo. I. A., 199; and see Mayor of Lyons *v.* Advocate-General of Bengal, L. R., 3 I. A., 32.

[5] Rajah Muttu Ramalinga Setupati *v.* Perianayagum Pillai, L. R., 1 I. A., 209.

[6] Rajah Muttu Ramalinga Setupati *v.* Perianaygum Pillai, L. R. 1 I. A., 209.

[7] Seshayyangar *v.* Sheshayyangar, I. L. R., 2 Mad., 143; Madhary *v.* Goburdhun Hulwai, I. L. R., 7 Calc., 694.

Mahomedans. The law relating to such endowments as stated by the Mahomedan authorities has been dealt with by one of my predecessors, Baboo Shama Churn Sircar, *Tagore Lectures*, 1874, and I only propose now to deal with the case-law on the subject.

LECTURE XII.

Elements of *wuqf*.

The chief elements of *wuqf* are special words declaratory of the appropriation, and a proper motive cause; and where the declaration is made in a solemnly published document, the *wuqf* is completed.[1] The primary object for which lands are endowed, and which are the objects which all Mahomedans have in view in endowing lands, are to support a mosque and to defray the expenses of the worship conducted in it.[2]

Creation of.

Wuqf implies the relinquishing the proprietary right in any article of property, such as lands, tenements, and the rest: and consecrating it in such manner to the service of God, that it may be of benefit to men, provided always, that the thing appropriated be, at the time of appropriation, the property of the appropriator,[3] even if it consists of an undefined share in an estate. The endowment will in such a case be valid to the extent of the share of the donor when ascertained.[4] Thus, a general dedication of lands for the purpose of a cemetery establishes a *wuqf*, and excepts it from descent to the heirs.[5] But a grant to an individual in his own right, and for the purpose of furnishing him with the means of subsistence, do not constitute a *wuqf*.[6] So, apparently, a *wuqf* cannot be created for the purpose merely of conferring a perpetual and inalienable estate on a particular family, without any ultimate limitation to the use of the poor, or some inextinguishable class of beneficiaries.[7]

In *Mahomed Hamidulla Khan* v. *Lotful Huq*,[8] a Mahomedan settled a portion of his property as follows: "I have made *wuqf* of the four annas in favour of my daughter and her descendants, as also her descendants' descendants how low so ever, and when they no longer exist, then in favour of the poor and needy;" and it was held, that this did not

[1] Doyal Chund Mullick v. Syud Keramut Ali, 16 W. R., 116.
[2] Muzhurool Huq v. Pubraj Ditarey Mohapattur, 13 W. R., 235.
[3] Moohummud Sadik v. Moohummud Ali, 1 Sel. Rep., 18.
[4] M. S. Hyotee Khanum v. M. S. Koolsum Khanum, 1 Sel. Rep., 217.
[5] Mir Nur Ali v. Majidah, 5 Sel. Rep., 136.
[6] Bibee Kuneez Fatima v. Bibee Saheba Jan, 8 W. R., 313.
[7] Phate Saheb Bibi v. Damodar Premji, I. L.R., 3 Bomb., 84.
[8] I. L. R., 6 Calc., 744.

LECTURE XII.

create a valid *wuqf*. But this case appears to conflict with the other authorities.

Evidence of appropriation.

No property can be considered as *wuqf* unless it be satisfactorily established that it has been specially so appropriated;[1] for instance, the payment of the expenses of a mosque out of the rents of a particular property is not in itself proof of an endowment.[2] It is not necessary that the grant should be in express terms for the benefit of the endowment, provided that the nature of the tenure be inferrible from the general contents of the grant.[3]

Wuqf to take effect after settlor's death.

The owner of lands may make an endowment settling lands upon himself for life, and after his death, for the support of the poor. In such a case the instrument operates as a will, and is only valid to the extent of one-third of the donor's property.[4] The main object of the Mahomedan law is, that the profits of the land endowed should be endowed for a purpose which always remains in existence. The poor are always with us, and therefore a man making an endowment, and enjoying the profits during his lifetime, to go to the poor after his death, does not make an endowment for uncertain or non-existent objects.[5]

Requisities to valid *wuqf*.

In *Mahomed Hamidulla Khan* v. *Lotful Huq*[6] it was held, that it is necessary among Sunnis, in order to validate a *wuqf*, that the donor should reduce himself to a state of absolute poverty. This is, however, it is submitted, inconsistent with many other rulings.

To constitute a valid *wuqf* according to Shiah law, it must be absolute and unconditional, and possession must be given of the thing granted. Thus, where a Mahomedan lady executed a deed conveying her property, on trust, for religious purposes, reserving for herself for life two-thirds of the income derivable from the property, and only making an absolute and unconditional grant of the rest for the purposes of the trust, it was held, that, under the Shiah law, the deed must be considered invalid with respect to the portion of the income reserved by the grantor to herself for life; but as to the rest that the deed operated as a good and valid grant.[7]

[1] Bindasoondree Dassea *v.* Meheroonissa Khatoon, S. D. A., 1853, pp. 69, 84.
[2] M. S. Shurfoonissa *v.* M. S. Koolsum, 25 W. R., 447.
[3] Kulb Ali Hossein *v.* Syf Ali, 2 Sel. Rep., 139.
[4] *Doe d.* Jaun Beebee *v.* Abdoollah Barber, 1 Fult., 345.
[5] Muzhurool Huq *v.* Pubraj Ditarey Mohapattur, 13 W. R., 235.
[6] I. L. R., 6 Calc., 744.
[7] Hajee Kalub Hossein *v.* M. S. Mehrun Bebee, 4 N. W. P., 155.

According to Mahomedan law, it is not necessary, in order to constitute a valid endowment for religious or charitable purposes, that the word '*wuqf*' should be used in the grant, if from the general nature of the grant it can be inferred that the property is to be so appropriated.[1] And conversely, the use of the word '*wuqf*' is not of itself sufficient to create an endowment. There must be a dedication of the property solely to the worship of God, or to religious or charitable purposes. A Mahomedan cannot, therefore, by using the term *wuqf* effect a settlement of property upon himself and his descendants which will keep such property inalienable by himself and his descendants for ever.[2]

If property has been dedicated for religious or charitable purposes, the use of the words '*inam*,' or '*altamgha*,' in the grant, will not confer an absolute proprietary right in the grantee. By a royal firman granted by Mahomed Firooksir, one lac of *dams* from a certain parganna were endowed and bestowed for the purpose of defraying the expenses of the khankah (a religious establishment) of Sheikh Rubeer, as an *altamgha* grant for him to manage and control and to descend to his heirs in succession from remove to remove. On the petition of Sheikh Gholam, the grandson of Sheikh Rubeer, who had succeeded to the office of sifiada-nashin of the khankah, Mahomed Shah granted a perwannah, enjoining that the lac of *dams* should be considered as an *altamgha-inam* for the purpose of being appropriated to the charges of the travellers to and from the khankah to descend to the offspring in succession; and a similar perwannah was granted on the petition of Sheik Kaim-ood-deen, the son of Sheikh Gholam, after the death of his father. By a subsequent grant by Shah Alam, two lacs of *dams* were granted as an *altamgha-inam* to Sheikh Kaim-ood-deen for the purpose of the frequenters to and from him, and all ranks were enjoined "always to maintain and uphold the august order, and to relinquish the aforesaid *dams* to them, to descend to the offspring in succession to be enjoyed by them" free from all Government and revenue charges. In 1807 and 1810, Shah Shum-sood-deen, the then sifiada nashin, alienated part of the property comprised in these grants, and died in 1810,

[1] Jewun Doss Sahoo *v.* Shah Kubeer-ood-deen, 2 Moo. I. A., 390.

[2] Abdul Gaune Kasam *v.* Hussen Miya Rahimtula, 10 Bom. H. C. R., 7; and see Mahomed Hamidulla Khan *v.* Lotful Huq, I. L. R., 6 Calc., 744.

LECTURE XII.

leaving the plaintiff, his son, then a minor. In 1829, the plaintiff was appointed by the Government to be mutawalli and sifiada-nashin of the establishment. In a suit instituted by him in 1822 to recover the property alienated by his father, it was held, that, notwithstanding the use of the terms '*inam*' and '*altamgha*' in the royal grants, and the mention therein of the persons on whose petitions the grants were made, yet these grants having been made for the purpose of maintaining a charitable institution, the persons named were not to be considered the proprietors; the establishment of the khankah was the real donee, and the persons named were only mutawallis of the khankah, who as such would have no right to alienate, and therefore that the alienation by Shumsood-deen was illegal.[1]

It is not necessary that the endowment should be in writing, or that the property should be delivered over. A verbal declaration of the intention to create an endowment is sufficient, if in the presence of witnesses.[2] Although the witnesses to the fact depose vaguely, yet their evidence, if corroborated by circumstances, is legally sufficient.[3]

Undue influence.

A *wuqf* will not be valid if the donor was subjected to any undue influence, or was not aware of the nature of the transaction. Thus, where an alleged endower was shown to be an illiterate purdanashin lady, and she denied on oath that, in executing the *wuqfnama*, she had any intention of creating an absolute *wuqf*, or that she understood the effect of the deed when she executed it, it was held, that the onus was on the persons who sought to remove her from the office, to show that she was fully aware of the character of the document and its legal effect, and that she had proper professional advice at the time of its execution, and, in the absence of such proof, that the deed was not binding on her.[4]

Endowment subject to mortgage.

The fact that a mortgage is in existence over property at the time when it is set apart as an endowment, does not invalidate the endowment, which will be considered as being subject to the mortgage. If, after a mortgage, the

[1] Jewun Doss Sahoo *v.* Shah Kubeer-ood-deen, 2 Moo. I. A., 390; see also M. S. Qadira *v.* Shah Kubeer-ood-deen Ahmud, 3 Sel. Rep., 407.

[2] *Doe* d. Jaun Bibee *v.* Abdoollah Barber, 1 Fult., 345; Shurbo Narain Singh *v.* Ally Buksh Shah, 2 Hay, 415.

[3] Abul Hasan *v.* Haji Mohammad Masih Karbalai, 5 Sel. Rep., 87.

[4] Delross Banoo Begum *v.* Nawab Syud Ashgur Ally Khan, 15 B. L. R., 167; S.C., 23 W. R., 453.

mortgagor endows the land, and dies leaving sufficient assets, his heirs are bound to apply those assets to the redemption of the mortgage, so that the endowment may take effect freed from the mortgage, by the application of other assets of the endower. But, if necessary, the mortgagee may enforce the mortgage by sale of the land, and the endowment will be rendered void as against the heirs of the endower; as against whom the surplus sale-proceeds will be subject to the endowment.[1] So, the mere charge upon the profits of the estate of certain items which must in course of time necessarily cease, and which, after they lapse, will leave the whole profits intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahomedan law.[2]

Revocation.

If property has been given over for religious and charitable purposes and the trust is complete, the *wuqf* cannot be affected by revocation, or by the bad conduct of those responsible for the carrying out of the trusts.[3]

According to Shiah law, the donor may recover back the property from the trustee, if at the time of the creation of the trust he has reserved the right to do so in express terms.[4]

Alienation of *wuqf* property.

As a general rule, it may be stated that the private alienation, temporary or absolute, by mortgage or otherwise, of *wuqf* lands, even though for the repair or other benefit of the endowment, is illegal according to the Mahomedan law;[5] and if endowed property descends as such to the widow of the endower as mutawalli, it cannot be sold in satisfaction of a claim against the estate of the endower.[6] The authorities disagree as to whether the appropriator's right continues or is extinguished; but they agree that it cannot be disposed of by gift or sale, and also that inheritance does not obtain in respect of it.[7]

[1] Shahazadi Hajra Begum *v.* Khaja Hossein Ali Khan, 4 B. L. R., A. C., 86; S. C., 12 W. R., 498.

[2] Muzhurool Huq *v.* Pubraj Ditarey Mohapattur, 13 W. R., 235.

[3] Doyal Chund Mullick *v.* Syud Keramut Ali, 16 W. R., 116. See Gulam Husain Saiyad *v.* Adji Ajam Kurai Shi, 4 Mad., 44.

[4] Hidait-oon-nissa *v.* Syud Afzul Hossein, 2 N. W. P., 420.

[5] Moulvee Abdoolla *v.* M. S Rajesri Dossea, 7 Sel. Rep., 268; S D A., 1846, p. 266: and see M. S. Qadira *v.* Shah Kubeer-oo-deen Ahmud, 3 Sel. Rep., 543; Abul Hasan *v.* Haji Mohammad Hasih Karbalai, 5 Sel. Rep, 87; Kulb Ali Hossein *v.* Syf Ali, 2 Sel. Rep. 139; Moulvee Abdoollah *v.* Ramzoo Dye, S. D. A., 1847, 192; Jewun Doss Sahoo *v.* Shah Kubeer-ood-deen, 2 Moo. I. A., 390; S. C., 6 W. R., 3.

[6] Fegredo *v.* Mahomed Mudessur, 15 W. R., 75.

[7] Jewun Doss Sahoo *v.* Shah Kubeer-ood-deen, 2 Moo. I. A., 390; S. C., 6 W. R., 3.

LECTURE XII.

The fact that the land is endowed must be proved, a mere nominal endowment will not prevent alienation.[1]

Nominal endowment.

Alienation subject to trust.

Where the whole of the profits of land are not devoted to religious purposes, but the land is heritable property burdened with a trust,—for example, the keeping up of a saint's tomb,—it may be alienated subject to the trust.[2]

Mortgage by local custom.

By local custom in the Broach District, *wuqf* land may be mortgaged, although the practice is contrary to Mahomedan law; for, by s. 26 of Reg. IV of 1827, the usage of a district in which a suit may arise takes precedence over the law of the defendant in the determination of civil suits.[3]

Lease of *wuqf* property.

If an endowment be wholly *wuqf*, a mutawalli is incapable of granting a lease extending beyond the period of his own life. If, however, the office is hereditary, and the mutawalli has a beneficial interest in the endowment, the property is looked upon as an heritable estate burdened with certain trusts, the proprietary right of which is vested in the mutawalli and his heirs, and he can exercise the right possessed by other proprietors, of granting leases, even in perpetuity.[4]

Where ryots holding land had been in the habit of transferring their holdings with the consent of the mutawallis, it was held, that a mutawalli who considered the practice to be illegal, was not justified in ousting a transferree, but should have taken his legal remedy by action.[5]

Transfer of trust.

The trustee of an endowment has not, as such, the power of transferring his trust to any other person, and where a trustee is empowered to appoint another trustee to act for him, he cannot transfer the right of exercising that power to another or others.[6] An assignment or bequest of the trust by the superintendent to his sons, on his deathbed, is good, but not an assignment made during health, unless he obtained it himself with such power.[7]

[1] Juddo Nundun Burral *v.* Kalee Coomar Ghose, S. D. A., 1852, p. 331.
[2] Futtoo Bibee *v.* Bhurrutlall Bhukut, 10 W. R., 299.
[3] Abas Alli Zenul Abaddin *v.* Gulam Muhammad Valad Baba Mirza, 1 Bom. H. C. R., Cr. Cas., 36.
[4] Dalrymple *v.* Khoondkar Azeezul Islam, S. D. A., 1858, p. 586; see also Shoojat Ali *v.* Zumeerooddeen, 5 W. R., 158.
[5] Moulvee Abdoollah *v.* Ram Zoo Dye, S. D. A., 1847, p. 192.
[6] Rup Narain Singh *v.* Junko Bye, 3 Calc., 112.
[7] Moohummud Sadik *v.* Moohummud Ali, 1 Sel. Rep., 19.

Purchaser from trustee.

In dealing with the mutawalli of an endowment, it is not necessary for the purchaser to look further than to the power of the mutawalli under his deed of trust. If the deed gives him power and discretion to make a sale, it is not a matter of concern to the purchaser whether that power or discretion is judiciously exercised or not.[1]

Breach of trust.

Trustees of an endowment may, if they commit a breach of trust in respect of the trust-property, be made to account to the persons interested in the endowment (see Act XX of 1863, *post*, Appendix). But the fact that trustees have failed to carry out the trusts, will not render the endowment invalid, and cause the property to revert to the heirs of the grantor.[2]

Where a mutawalli was proved to have been guilty of waste, the High Court ordered him to file in Court every six months a true and complete account of his income, expenditure, and dealings with the property belonging to the endowment.[3]

Removal of trustee.

If the superintendent of an endowment misconducts himself, he may, according to the Mahomedan law, be removed by the ruling power (see Act XX of 1863, *post* Appendix); and this is sufficient to protect the objects for which the trust was created.[4] But this rule does not apply to the case of a trustee who has an hereditary proprietary right vested in him.[5] In some instances the donor has the power of removing the superintendent. But in order that such power may be exercised, it must have been specially reserved at the time of endowment.[6] Where a plaintiff sued to recover possession of certain property as *wuqf* property, alleging misconduct on the part of the mutawalli in selling a portion of the property, but the plaintiff did not state or prove, that he was entitled to partake of the benefit of the endowment, nor did he show that he was the heir, or even a near relative, of the person who made the endowment,—it was held, that the utmost that he had a right to do as a descendant of the endower

[1] Moonshee Golam Ali *v.* M. S. Sowlutoonissa Bibee, W. R., 1864, p. 242.

[2] Kasheshurree Dassee *v.* Krishnakaminee Dassee, 2 Hay, 557; Reasut Ali *v.* Abbott, 12 W. R., 132; Syud Asheerooddeen *v.* S. M. Drobo Moyee, 25 W. R., 557.

[3] Syud Imdad Hossein *v.* Mahomed Ali Khan. 23 W. R., 150.

[4] Hidait-oon-nissa *v.* Syud Afzul Hossein 2 N. W. P., 420; Moohummud Sadik *v.* Moohummud Ali, 1 Sel. Rep., 19.

[5] Gulam Hussain Saib Saiyad *v.* Adji Ajam Saib Kuraishi, 4 Mad. H. C. R., 44.

[6] *Ibid.*

LECTURE XII.

was, to have the mutawalli removed and a new mutawalli appointed; and that, in strictness, he ought to show circumstances which, according to law, would justify the Court in selecting a mutawalli.[1]

The appropriator of land for religious or charitable purposes can confer the office of superintendent on another at any time;[2] and a trustee may appoint a manager, but such appointment is not effectual beyond the incumbency of the appointor.[3]

Office of trustee.

When property is appropriated for religious or charitable purposes, it is vested in some person or persons whose duty it is to preserve it and to carry out the trusts created. According to both Sunni and Shiah law, the donor has a right to reserve the superintendence of the *wuqf* to himself, or to appoint some one else.[4] The right to the income of land endowed for such purposes is inseparable from the office for the support of which the land was granted,[5] and cannot be claimed by the grantor's heirs. The fact that a person is a Shiah does not disqualify him for the supervision of a *wuqf* made by a Sunni.[6]

Female may be mutawalli.

A female may act as mutawalli. She may manage the temporal affairs of the endowment, but not the spiritual affairs connected with it, the management of the latter requiring peculiar personal qualifications. These duties she may discharge by proxy.[7]

Succession to the office.

When property is devoted to religious or charitable purposes, it is usual for the appropriator to lay down rules for succession to the office of trustee, and upon these rules, whether they are in writing, or have to be inferred from evidence of usage, the question of succession depends.[8] Should no rules be laid down, the power of appointing a trustee is vested in the appropriator during his life, and upon his death, it is vested in his executor; or should he have left no executor, in the magistrate and sovereign

[1] Hurruck Chund Sahoo *v.* Golam Shuruff, 10 W. R., 458.
[2] Sheik Abdool Khalek *v.* Poran Bibee, 25 W. R., 542.
[3] Shah Moheeooddeen Ahmed *v.* Elahee Buksh, 6 W. R., 277.
[4] Advocate-General *v.* Fatima Sultani Begam, 9 Bom. H. C. R., 19.
[5] Jafar Mohiudin Sahib *v.* Ali Mohiudin Sahib, 2 Mad. H C. R., 19.
[6] Doyal Chund Mullick *v.* Syud Keramut Ali, 16 W. R., 116.
[7] *Doe d.* Jaun Beebee *v.* Abdoollah Barber, 1 Fult., 345; M. S. Hyatee Khanum *v.* M. S. Koolsum Khanum, 1 Sel. Rep., 217; Hussain Beebee *v.* Hussain Sherif, 4 Mad. H. C. R., 23.
[8] Shah Gulam Rahumtulla Sahib *v.* Mahommed Akbar Sahib, 8 Mad. H. C. R., 63.

power,—that is to say, in the Court.[1] When the donor has specified the class from which the manager is to be selected, he cannot discharge his own trust-deed and name a person not answering the proper description. He is bound by the provisions of the deed, and the appropriator's right of nomination of the person to succeed to the management on his death must be confined to the class mentioned in the deed.[2]

In *Agha Mahomed Eusoof Moosadee* v. *Abdool Hossein Khan*[3] it was held, that the power of appointment of a superintendent of a mosque, if not provided for by some special rule in a deed of endowment, must be governed by the ordinary rule of Mahomedan law, under which, in the absence of all provision on the subject in the deed of endowment, a superintendent is authorized on his death-bed to appoint a successor, though the appropriator has not given him a general permission. And in *Peet Koonwar* v. *Chutter Dharee Singh*,[4] that when the mutawalli of an endowment dies without nominating a successor, the management must revert to the heirs of the person who endowed the property.

Where, so far as the will of a founder could be ascertained from the usage of former days, it seemed to authorize a mode of succession originating in an appointment by the incumbent of a successor, it was held, that the Court would not be authorized to find in favour of any rule of succession by primogeniture, solely from the circumstance that the persons appointed were usually the elder sons.[5]

Suits in respect of *wuqf* property.

A suit to recover property alleged to be *wuqf* belongs not to the heirs or descendants of the settlor, but to the mutawallis jointly.[6] But a person who has been convicted of having misappropriated *wuqf* property cannot obtain the assistance of the Court to recover the property in order to enable him to exercise the office of mutawalli.[7] When

[1] Moohumud Sadik v. Moohumud Ali, 1 Sel. Rep., 18; Muhammad Kasim v. Muhammad Alum Kiyamuddeen, 5 Sel. Rep., 133; Advocate-General v. Fatima Sultani Begam, 9 Bom. H. C. R., 19; Phate Saheb Bibi v. Damodar Premji, I. L. R., 3 Bomb., 84. See also Act XX of 1863, *post*, Appendix.

[2] Advocate-General v. Fatima Sultani Begam, 9 Bom. H. C. R., 19.

[3] S. D. A. 1857, p. 640.

[4] 13 W. R., 396.

[5] Shah Gulam Rahumtulla Sahib v. Mahommed Akbar Sahib, 8 Mad. H. C. R., 63.

[6] Phate Saheb Bibi v. Damodar Premji, I. L. R., 3 Bomb., 84.

[7] Aga Mahomed Kumul Tehranee v. Aga Abbas Tehranee, S. D. A., 1859, p. 285.

LECTURE XII.

the Court, in the exercise of its charitable jurisdiction, is called upon to adjudicate between conflicting claims of dissident parties in a community distinguished by some religious profession, the rights of the litigants will be regulated by reference to the religious tenets held by the community in its origin, and a minority holding those tenets will prevail against a majority which has receded from them.[1]

Where a plaintiff who had for eighteen years held a portion of certain lands, though termed *wuqf*, as privately heritable and divisible lands, other portions being similarly held by other parties, co-heirs with the plaintiff, of the last occupiers,—it was held, that the plaintiff could not be allowed to sue for exclusive possession of the whole of the lands as mutawalli, upon tender of proof that they were *wuqf*.[2] In a suit for possession of land granted in trust for purposes connected with the preservation of the tomb of a Mahomedan saint, where the plaintiff claimed as son of the last mutawalli, on the allegation that he had been dispossessed during his minority, and the defendant contended that the property had never been in the possession of mutawallis, but had been divided among the original grantee's heirs, from one of whom the portion in dispute had come into the possession of his (the defendant's) vendor, it was held, that the material point to try was, whether the plaintiff's ancestors had, from the time of the grant, been in possession, or whether the land had been inherited according to the ordinary rules of Mahomedan inheritance by the heirs of the grantee.[3]

The worshippers at a public mosque can maintain a suit to restrain the superintendents of such mosque from using it or its appurtenant rooms for purposes other than those for which they were intended to be used, and from doing acts which are likely to obstruct worshippers from entering or leaving such mosque.[4]

[1] Advocate-General *v.* Muhammad Husen Huseni, 12 Bom. H. C. R., 323.
[2] Hajee Nooroollah *v.* Meer Waris Hossein, S. D. A. 1853, p. 411.
[3] Reasut Ali *v.* Abbott, 12 W. R., 132.
[4] Abdul Rahman *v.* Yar Muhammed, I. L. R., 3 All., 636.

APPENDIX.

REGISTRATION OF SOCIETIES.

ACT XXI OF 1860.

An Act for the Registration of Literary, Scientific, and Charitable Societies.

Preamble.

WHEREAS it is expedient that provision should be made for improving the legal condition of Societies established for the promotion of literature, science, or the fine arts, or for the diffusion of useful knowledge, or for charitable purposes; It is enacted as follows:

Societies formed by memorandum of association.

I. Any seven or more persons associated for any literary, scientific, or charitable purpose, or for any such purpose as is described in section XX of this Act, may, by subscribing their names to a memorandum of association, and filing the same with the Registrar of Joint Stock Companies under Act XIX of 1857, form themselves into a society under this Act.

Memorandum of association.

II. The memorandum of association shall contain the following things (that is to say):—

The name of the society.

The objects of the society.

The names, addresses, and occupations of the governors, council, directors, committee, or other governing body to whom, by the rules of the society, the management of its affairs is entrusted. A copy of the rules and regulations of the society, certified to be a correct copy by not less than three of the members of the governing body, shall be filed with the memorandum of association.

Registration.

III. Upon such memorandum and certified copy being filed, the Registrar shall certify under his hand that the society is registered under this

APPDX. Act

There shall be paid to the Registrar, for every such registration, a fee of fifty rupees, or such smaller fee as the Governor General of India in Council may, from time to time, direct; and all fees so paid shall be accounted for to the Government.

Annual list of managing body to be filed.

IV. Once in every year, on or before the 14th day succeeding the day on which, according to the rules of the society, the annual general meeting of the society is held, or if the rules do not provide for an annual general meeting, in the month of January, a list shall be filed with the Registrar of Joint Stock Companies, of the names, addresses, and occupations of the governors, council, directors, committee, or other governing body then entrusted with the management of the affairs of the society.

Property of society how to be vested.

V. The property, moveable and immoveable, belonging to a society registered under this Act, if not vested in trustees, shall be deemed to be vested, for the time being, in the governing body of such society, and in all proceedings, civil and criminal, may be described as the property of the governing body of such society by their proper title.

How suits by and against societies to be brought.

VI. Every society registered under this Act may sue or be sued in the name of the president, chairman, or principal secretary, or trustees, as shall be determined by the rules and regulations of the society; and in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion: provided that it shall be competent for any person having a claim or demand against the society, to sue the president, or chairman, or principal secretary, or the trustees thereof, if on application to the governing body some other officer or person be not nominated to be the defendant.

Suits not to abate.

VII. No suit or proceeding in any Civil Court shall abate or discontinue by reason of the person, by or against whom such suits or proceedings shall have been brought or continued, dying, or ceasing to fill the character in the name whereof he shall have sued, or been sued, but the same suit or proceeding shall be continued in the name of or against the successor of such person.

How judgment to be enforced against.

VIII. If a judgment shall be recovered against the person or officer named on behalf of the society, such judgment shall not be put in force against the property, moveable or immoveable, or against the body of such person or officer, but against the property of the society. The application for execution shall set forth the judgment, the fact of the party against

whom it shall have been recovered having sued or having been sued, as the case may be, on behalf of the society only, and shall require to have the judgment enforced against the property of the society.

Society may make bye-law to be enforced.

IX. Whenever by any bye-law duly made in accordance with the rules and regulations of the society, or if the rules do not provide for the making of bye-laws, by any bye-law made at a general meeting of the members of the society convened for the purpose (for the making of which the concurrent votes of three-fifths of the members present at such meeting shall be necessary), any pecuniary penalty is imposed for the breach of any rules or bye-law of the society, such penalty, when accrued, may be recovered in any Court having jurisdiction where the defendant shall reside, or the society shall be situate, as the governing body thereof shall deem expedient.

Members liable to be sued as strangers.

X. Any member who may be in arrear of a subscription which, according to the rules of the society, he is bound to pay, or who shall possess himself of, or detain, any property of the society, in a manner or for a time contrary to such rules, or shall injure or destroy any property of the society, may be sued for such arrear or for the damage accruing from such detention, injury, or destruction of property in the manner hereinbefore provided. But if the defendant shall be successful in any suit or other proceeding brought against him at the instance of the society, and shall be adjudged to recover his costs, he may elect to proceed to recover the same from the officer in whose name the suit shall be brought, or from the society; and in the latter case shall have process against the property of the said society in the manner above described.

Members guilty of offences punishable as strangers.

XI. Any member of the society, who shall steal, purloin, or embezzle any money or other property, or wilfully and maliciously destroy or injure any property of such society, or shall forge any deed, bond, security for money, receipt or other instrument, whereby the funds of the society may be exposed to loss, shall be subject to the same prosecution, and, if convicted, shall be liable to be punished in like manner, as any person not a member would be subject and liable to in respect of the like offence.

Societies enabled to alter, extend, or abridge their purposes.

XII. Whenever it shall appear to the governing body of any society registered under this Act, which has been established for any particular purpose or purposes, that it is advisable to alter, extend, or abridge such purpose to or for other purposes within the meaning of this Act, or to amalgamate such society, either wholly or partially, with any

APPDX. other society, such governing body may submit the proposition to the members of the society in a written or printed report, and may convene a special meeting for the consideration thereof according to the regulations of the society; but no such proposition shall be carried into effect unless such report shall have been delivered or sent by post to every member of the society ten days previous to the special meeting convened by the governing body for the consideration thereof, nor unless such proposition shall have been agreed to by the votes of three-fifths of the members delivered in person or by proxy, and confirmed by the votes of three-fifths of the members present at a second special meeting convened by the governing body at an interval of one month after the former meeting.

Provision for the dissolution of societies and adjustment of their affairs.

XIII. Any number not less than three-fifths of the members of any society may determine that it shall be dissolved, and thereupon it shall be dissolved forthwith, or at the time then agreed upon, and all necessary steps shall be taken for the disposal and settlement of the property of the society, its claims and liabilities, according to the rules of the said society applicable thereto, if any, and, if not, then as the governing body shall find expedient; provided that, in the event of any dispute arising among the said governing body or the members of the society, the adjustment of its affairs shall be referred to the principal Court of original civil jurisdiction of the district in which the chief building of the society is situate; and the Court shall make such order in the matter as it shall deem requisite. Provided that no society shall be dissolved unless three-fifths of the members shall have expressed a wish for such dissolution by their votes delivered in person, or by proxy, at a general meeting convened for the purpose. Provided that, whenever the Government is a member of, or a contributor to, or otherwise interested in any society registered under this Act, such society shall not be dissolved without the consent of Government.

Upon a dissolution no member to receive profit.

XIV. If, upon the dissolution of any society registered under this Act, there shall remain, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of the said society or any of them, but shall be given to some other society, to be determined by the votes of not less than three-fifths of the members present, personally or by proxy, at the time of the dissolution, or in default thereof by such Court as aforesaid. Provided, however, that this clause shall not apply to any society which shall have been founded or established by the contributions of shareholders in the nature of a joint stock company.

Proviso for joint stock companies.

Who is a member.

XV. For the purposes of this Act, a member of a society shall be a person, who, having been admitted therein according to the rules and regulations thereof, shall have paid his subscription, or shall have signed the roll or list of members thereof, and shall not have resigned in accordance with such rules and regulations; but in all proceedings under this Act, no person shall be entitled to vote or be counted as a member whose subscription at the time shall have been in arrear for a period exceeding three months.

The governing body defined.

XVI. The governing body of the society shall be the governors, council, directors, committee, trustees, or other body to whom, by the rules and regulations of the society, the management of its affairs is entrusted.

Registration of societies formed before this Act.

XVII. Any company or society established for a literary, scientific, or charitable purpose, and registered under Act XLIII of 1850, or any such society established and constituted previously to the passing of this Act, but not registered under the said Act XLIII of 1850, may, at any time hereafter, be registered as a society under this Act, subject to the proviso that no such company or society shall be registered under this Act, unless an assent to its being so registered has been given by three-fifths of the members present personally or by proxy at some general meeting convened for that purpose by the governing body. In the case of a company or society registered under Act XLIII of 1850, the directors shall be deemed to be such governing body. In the case of a society not so registered, if no such body shall have been constituted on the establishment of the society, it shall be competent for the members thereof, upon due notice, to create for itself a governing body to act for the society thenceforth.

Such societies to file memorandum, &c., with Registrar of Joint Stock Companies.

XVIII. In order to any such society as is mentioned in the last preceding section obtaining registry under this Act, it shall be sufficient that the governing body file with the Registrar of Joint Stock Companies, under Act XIX of 1857, a memorandum showing the name of the society, the objects of the society, and the names, addresses, and occupations of the governing body, together with a copy of the rules and regulations of the society certified as provided in section II, and a copy of the report of the proceedings of the general meeting at which the registration was resolved on.

Inspection of documents.

XIX. Any person may inspect all documents filed with the Registrar under this Act on payment of a fee of one rupee for each inspection; and any person may require a copy or extract

APPDX. of any document or any part of any document to be certified by the Registrar, on payment of two annas for every hundred words of such copy or extract; and such certified copy shall be *primâ facie* evidence of the matters therein contained in all legal proceedings whatever.

Certified copies.

XX. The following societies may be registered under this Act: charitable societies; the military orphan funds or societies established at the several presidencies of India; societies established for the promotion of science, literature, or the fine arts; for instruction, the diffusion of useful knowledge, the foundation or maintenance of libraries or reading-rooms for general use among the members or open to the public; or public museums and galleries of paintings and other works of art; collections of natural history; mechanical and philosophical inventions, instruments, or designs.

To what societies the Act shall apply.

RELIGIOUS ENDOWMENTS.

ACT XX OF 1863.

An Act to enable the Government to divest itself of the management of Religious Endowments.

WHEREAS it is expedient to relieve the Boards of Revenue and the Local Agents in the Presidency of Fort William in Bengal, and the Presidency of Fort Saint George, from the duties imposed on them by Regulation XIX of 1810 of the Bengal Code (for the due appropriation of the rents and produce of lands granted for the support of mosques, Hindu temples, colleges, and other purposes; for the maintenance and repair of bridges, serays, kuttras, and other public buildings; and for the custody and disposal of nuzzool property or escheats) and Regulation VII of 1817 of the Madras Code (for the due appropriation of the rents and produce of lands granted for the support of mosques, Hindoo temples, and colleges, or other public purposes; for the maintenance and repair of bridges, choultries, or chuttrums, and other public buildings; and for the custody and disposal of escheats), so far as those duties embrace the superintendence of lands granted for the support of mosques or Hindoo temples, and for other religious uses,—the appropriation of endowments made for the maintenance of such religious establishments,—the repair and preservation of buildings connected therewith, and the appointment of trustees or managers thereof, or involve any connexion with the management of such religious establishments; and whereas it is expedient for that purpose to repeal so

Preamble.

much of Regulation XIX of 1810 of the Bengal Code, and Regulation VII of 1817 of the Madras Code, as relate to endowments for the support of mosques, Hindoo temples, or other religious purposes; It is enacted as follows:—

Regulations repealed.

I. So much of Regulation XIX of 1810 of the Bengal Code, and so much of Regulation VII of 1817 of the Madras Code, as relate to endowments for the support of mosques, Hindoo temples, or other religious purposes, are repealed.

Number.

II. In this Act words importing the singular number shall include the plural, and words importing the plural number shall include the singular.

Gender.

Words importing the masculine gender shall include females.

The words 'Civil Court' and 'Court' shall mean the principal Court of original civil jurisdiction in the District in which the mosque, temple, or religious establishment is situate, relating to which, or to the endowment whereof, any suit shall be instituted or application made under the provisions of this Act.

Local Government to make special provision respecting mosques, &c., in certain cases.

III. In the case of every mosque, temple, or other religious establishment to which the provisions of either of the Regulations specified in section I are applicable, and the nomination of the trustee, manager, or superintendent whereof, at the time of the passing of this Act, is vested in, or may be exercised by, the Government or any public officer, or in which the nomination of such trustee, manager, or superintendent shall be subject to the confirmation of the Government or any public officer, the Local Government shall, as soon as possible after the passing of this Act, make special provision as hereinafter provided.

The words "trustee, manager, or superintendent of a mosque," etc., mentioned in this Act, mean the trustee, manager, or superintendent of a mosque, etc, to which the provisions of the Act are applicable, not the trustee, etc., of any mosque; and such persons are those to whom the provisions of the Regulations mentioned in s. 1 were applicable. The mosques, etc., to which the provisions of those Regulations were applicable were mosques for the support of which endowments had been granted in land by the Government of the country or by individuals; and the mosques, etc., to which the provisions of this Act apply are, not any mosque, etc., but any mosque for the support of which such endowments have been made—*Jan Ali* v. *Ram Nath Mundul*, Reg. App. No. 149 of 1880, I. L. R., 8 Calc., January number.

Where the tomb of a reputed saint became a place of pilgrimage, and an endowment was made for the maintenance of the shrine and for the performance of certain religious ceremonies, and it appeared that there was a practice on the part of the proprietors and the managers of the institution to divide among themselves the residue of the income, and to dispose by way of sale or mortgage of the share enjoyed by them,—it was held, that this was a religious institution within the meaning of the Act.—*Fakurudin Sahib* v. *Ackeni Sahib*, I. L. R., 2 Mad., 197.

APPDX.

A committee appointed under this Act have power to dismiss trustees or superintendents of temples described in this section, without having recourse to a civil suit; but such powers can only be exercised on good and sufficient grounds.—*Chinna Rangaiyangar* v. *Subbraya Mudali*, 3 Mad. H. C. R., 334. Where no such grounds appeared, a suit, brought by the person who had been appointed by the committee as superintendent in place of the defendants for the recovery of the temple and the property belonging to it, was dismissed.—*Ibid.*

Transfer to independent trustees, &c., of all property belonging to their trusts, &c., remaining in charge of Revenue Board or others.

IV. In the case of every such mosque, temple, or other religious establishment which, at the time of the passing of this Act, shall be under the management of any trustee, manager, or superintendent, whose nomination shall not vest in, nor be exercised by, nor be subject to the confirmation of the Government or any public officer, the Local Government shall, as soon as possible after the passing of this Act, transfer to such trustee, manager, or superintendent all the landed or other property which, at the time of the passing of this Act, shall be under the superintendence or in the possession of the Board of Revenue or any local agent, and belonging to such mosque, temple, or other religious establishment, except such property as is hereinafter provided; and the powers and responsibilities of the Board of Revenue and the local agents, in respect to such mosque, temple, or other religious establishment, and to all land and other property so transferred, except as regards acts done and liabilities incurred by the said Board of Revenue, or any local agent, previous to such transfer, shall cease and determine.

Where the manager of endowed property had been ejected by the Collector under Regulation VII of 1817, it was held, that, on the passing of this Act, the manager became entitled by virtue of this section to the restoration of the endowment.—*Jusagheri Gosamiar* v. *The Collector of Tanjore*, 5 Mad. H. C. R., 334.

In 1849 the Board of Revenue interfered in the affairs of a temple. It did not appear whether any transfer of property had been made under this section; but, in 1865, the Judge of Patna appointed a manager of the temple. It was held, that the right of Government officers to control the affairs of the temple had been sufficiently proved—*Dhurm Singh* v. *Kissen Singh*, I. L. R., 7 Calc. 767.

Procedure in case of dispute as to right of succession to vacated trusteeship, &c.

V. Whenever from any cause a vacancy shall occur in the office of any trustee, manager, or superintendent, to whom any property shall have been transferred under the last preceding section, and any dispute shall arise respecting the right of succession to such office, it shall be lawful for any person interested in the mosque, temple, or religious establishment to which such property shall belong, or in the performance of the worship or of the service thereof, or the trusts relating thereto, to apply to the Civil Court to

appoint a manager of such mosque, temple, or other religious establishment, and thereupon such Court may appoint such manager, to act until some other person shall by suit have established his right of succession to such office. The manager so appointed by the Civil Court shall have, and shall exercise, all the powers which, under this or any other Act, the former trustee, manager, or superintendent, in whose place such manager is appointed by the Court, had or could exercise, in relation to such mosque, temple, or religious establishment, or the property belonging thereto.

Where an application by a petitioner under this section to be appointed manager of a religious endowment was rejected by the Judge after hearing both sides, on the ground that there had been no transfer of the property by the Local Government under s. 4, the Court refused to interfere under cl. 15 of the Charter, holding, that the Judge had not declined to accept jurisdiction in the case, and that he was right in refusing to accept the jurisdiction vested in him by this section.—*Khajah Ashruf Hossein* v. *M. S. Hazara Begum*, 18 W. R., 396.

Rights, powers, and responsibilities of trustees, &c., to whom any charge shall be transferred.

VI. The rights, powers, and responsibilities of every trustee, manager, or superintendent, to whom the land and other property of any mosque, temple, or other religious establishment is transferred in the manner prescribed in section IV of this Act, as well as the conditions of their appointment, election, and removal, shall be the same as if this Act had not been passed, except in respect of the liability to be sued under this Act, and except in respect of the authority of the Board of Revenue and local agents, given by the Regulations hereby repealed, over such mosque, temple, or religious establishment, and over such trustee, manager, or superintendent, which authority is hereby determined and repealed. All the powers which might be exercised by any Board, or local agent, for the recovery of the rent of land or other property transferred under the said section IV of this Act, may, from the date of such transfer, be exercised by any trustee, manager, or superintendent to whom such transfer is made.

Appointment of committees.

VII. In all cases described in section III of this Act, the Local Government shall once for all appoint one or more committees in every Division or District, to take the place, and to exercise the powers, of the Board of Revenue and the local agents under the Regulations hereby repealed. Such committee shall consist of three or more persons, and shall perform all the duties imposed on such Board and local agents, except in respect of any property which is specially provided for under section XXI of this Act.

A district committee has no right to call for accounts from the trustees of temples which are within s. 4.—*Venkatabalakrishna Chettiyar* v. *Kaliya Naramaiyangar*, 5 Mad. H. C. R., 48; *Ramiengar* v. *Gnanasmbanda Pandarasannada*, *ib.*, 53.

APPDX.

Provision as to qualifications for member of such committee.

VIII. The members of the said committee shall be appointed from among persons professing the religion for the purposes of which the mosque, temple, or other religious establishment was founded, or is now maintained, and in accordance, so far as can be ascertained, with the general wishes of those who are interested in the maintenance of such mosque, temple, or other religious establishment. The appointment of the committee shall be notified in the official Gazette. In order to ascertain the general wishes of such persons in respect of such appointment, the Local Government may cause an election to be held, under such rules (not consistent with the provisions of this Act) as shall be framed by such Local Government.

Every member to be appointed for life, unless removed for misconduct, &c.

IX. Every member of a committee appointed as above shall hold his office for life, unless removed for misconduct or unfitness, and no such member shall be removed except by an order of the Civil Court as hereinafter provided.

Provision for filling up vacancies.

X. Whenever any vacancy shall occur among the members of a committee appointed as above, a new member shall be elected to fill the vacancy by the persons interested as above provided. The remaining members of the committee shall, as soon as possible, give public notice of such vacancy, and shall fix a day, which shall not be later than three months from the date of such vacancy, for an election of a new member by the persons interested as above provided, under rules for elections which shall be framed by the Local Government, and whoever shall be then elected, under the said rules, shall be a member of the committee to fill such vacancy. If any vacancy as aforesaid shall not be filled up by such election as aforesaid within three months after it has occurred, the Civil Court, on the application of any person whatever, may appoint a person to fill the vacancy, or may order that the vacancy be forthwith filled up by the remaining members of the committee, with which order it shall then be the duty of such remaining members to comply; and if this order be not complied with, the Civil Court may appoint a member to fill the said vacancy.

No member of a committee to be trustee, &c., of the mosque, &c., under charge of such committee.

XI. No member of a committee appointed under this Act shall be capable of being, or shall act, also as a trustee, manager, or superintendent of the mosque, temple, or other religious establishment, for the management of which such committee shall have been appointed.

On appointment of committee, Board and local agents to transfer property.

XII. Immediately on the appointment of a committee, as above provided, for the superintendence of any such mosque, temple, or religious establishment, and for the management of its affairs, the Board of Revenue, or the local agents acting under the authority of the said Board, shall transfer to such committee all landed or other property which at the time of appointment shall be under the superintendence or in the possession of the said Board or local agents and belonging to the said religious establishment, except as is hereinafter provided for, and thereupon the powers and responsibilities of the Board and the local agents in respect to such mosque, temple, or religious establishment, and to all land and other property so transferred, except as above, and except as regards acts done and liabilities incurred by the said Board or agents previous to such transfer, shall cease and determine. All the powers which might be exercised by any Board or local agent for the recovery of the rent of land or other property transferred under this section, may, from the date of such transfer, be exercised by such committee to whom such transfer is made.

SECRETARIAT

Account of receipts and disbursements.

XIII. It shall be the duty of every trustee, manager, and superintendent of a mosque, temple, or religious establishment, to which the provisions of this Act shall apply, to keep regular accounts of his receipts and disbursements in respect of the endowments and expenses of such mosque, temple, or other religious establishment; and it shall be the duty of every committee of management, appointed or acting under the authority of this Act, to require from every trustee, manager, and superintendent of such mosque, temple, or other religious establishment the production of such regular accounts of such receipts and disbursements at least once in every year, and every such committee of management shall themselves keep such accounts thereof.

Any person interested may sue in case of breach of trust, &c.

XIV. Any person or persons interested in any mosque, temple, or religious establishment, or in the performance of the worship, or of the service thereof, or the trusts relating thereto, may, without joining as plaintiff any of the other persons interested therein, sue before the Civil Court the trustee, manager, or superintendent of such mosque, temple, or religious establishment, or the member of any committee appointed under this Act, for any misfeasance, breach of trust, or neglect of duty, committed by such trustee, manager, superintendent, or member of such committee, in respect of the trusts vested in or confided to them, respectively, and the Civil Court may direct the specific performance of any act by such trustee, manager, superintendent, or member of

APPDX. a committee, and may decree damages and costs against such trustee, manager, superintendent, or member of a committee, and may also direct the removal of such trustee, manager, superintendent, or member of a committee.

This section is generally applicable to all religious endowments, and while it in one sense restrains the ordinary Courts from dealing with cases against trustees of religious endowments, it gives special facilities for suits in the principal Civil Court of the district by any of the persons mentioned in these endowments.—*Dhurm Singh* v. *Kissen Singh*, I. L. R., 7 Calc., 767.

Under s. 15 of Reg. XIX of 1810, it was decided that a curator, removed by the Board of Revenue on the ground of misconduct, might bring an action to try the sufficiency of that ground.—*Wasik Ali Khan* v. *The Government*, 5 Sel., 370; 6 *Ibid*, 130.

In a suit by two of the worshippers at a certain mosque, instituted, after having obtained the sanction of the Advocate-General under s. 539 of the Civil Procedure Code, against the mutawalli of the mosque, and two other persons to whom the mutawalli had mortgaged part of the endowed property to secure the repayment of a loan, it appeared that one of the mortgagees had sold some of the *wuqf* property in execution of a decree which he had obtained upon his mortgage, and the property had been purchased by the other mortgagee. The plaintiffs prayed that the property purchased might be declared to be *wuqf;* that the sale in execution might be declared to be invalid; that a mutawalli might be appointed by the Court; and that the costs of doing the acts of the *wuqf* might be defrayed from the profits of the property belonging to the endowment. It was held, that so far as regarded that portion of the prayer as fell within the provisions of s. 539 of the Code, the plaintiffs were not entitled to sue, as they were not "persons having a direct interest in the trust" within the meaning of that section, and that the suit should have been instituted under this section after sanction obtained under s. 18; and that although the plaintiffs might possibly have obtained leave to sue under s. 30 of the Code on behalf of themselves and the other persons attending the mosque, they not having obtained such leave were not entitled to institute the suit for the purpose of obtaining the relief asked for in the other prayers of the plaint — *Jan Ali* v. *Ram Nath Mundul*, Reg. App., No. 149 of 1880, I. L. R., 8 Calc., January number.

Where a sacred book was kept at a temple and was an object of veneration to the members of the sect entitled to worship there, it was held, that a suit would lie under this section, by some of the persons interested in the temple, to restrain the superintendent from removing the book to another place, and that he should be directed to retain the book as a portion of the furniture of the temple.—*Dhurm Singh* v. *Kissen Singh*, I. L. R., 7 Calc., 767.

An order under this section should be mandatory and not prohibitory.—*Ibid.*

This section empowers the Court to remove trustees, whether hereditary or selected.—*Fakurudin Sahib* v. *Aokeni Sahib*, I. L. R., 2 Mad., 197.

Nature of interest entitling a person to sue.

XV. The interest required in order to entitle a person to sue under the last preceding section need not be a pecuniary, or a direct or immediate, interest, or such an interest as would entitle the person suing to take any part in the management or superintendence of the trusts. Any person having a right of attendance, or having been in the habit of

attending at the performance of the worship or service of any mosque, temple, or religious establishment, or of partaking in the benefit of any distribution of alms, shall be deemed to be a person interested within the meaning of the last preceding section.

Nature of suits contemplated by Act.

The suits to which this Act applies are such as come within the provisions of s. 14, which only refer to suits against trustees, managers, or superintendents, or the members of a district committee while in office.—*Jeyangarulararu* v. *Sri Hati Durma Dossji*, 4 Mad. H C. R., 2. It applies, in fact, to such religious trusts and endowments which had been, or might come to be, under the management of the Government.—*Kalee Churn Giree* v. *Golabi*, 2 C. L. R., 128. It does not apply to a suit brought by the *dharmakarta* of a temple and one of its worshippers to compel the heir of the late manager to make good, out of the property inherited by him, the deficiency in the *devasthanum* funds caused by the breach of trust and misapplication of the late manager.—*Jeyangarulavaru* v. *Sri Hati Durma Dossji*, 4 Mad. H. C. R., 2.

A suit for the removal of a mohunt and the appointment of another in his place is not within the Act—*Kishore Bon Mohunt* v. *Kalee Churn Giree*, 22 W. R., 364. And a suit by an officer of a mosque, temple, or other religious endowment, for dismissal from his office, is not a suit for misfeasance, within the meaning of s. 14.—*Syed Amin Sahib* v. *Ibram Sahib*, 4 Mad. H. C R, 112.

Where the plaintiffs described themselves as the Calcutta Tairo Puntee Anungo Punch Brethren, and alleged that the management and control of the temples, endowments, and worship of the Degumbery sect of Jains was vested in them, and that they formed the committee for the management of all the Jain charities as well in Calcutta as in all the other towns and places in India, and sued for the construction of a will and a declaration of their rights thereunder as members of the Punch, and to have property dedicated by the will to religious purposes ascertained and secured, it was held, that such a suit did not fall under Act XX of 1863, but came under the ordinary jurisdiction of the Court, which is similar in its general features to that of the Lord Chancellor in England—*Panch Cowrie Mull* v. *Chumroololl*, I. L. R., 3 Calc., 563; S. C., 2 C. L. R., 121.

By whom suits may be brought.

Any person interested in the endowment, and the interest need not be a pecuniary one, may, after leave obtained, sue the trustee, manager, or superintendent, or the members of a committee appointed under the Act, for misfeasance.—*Bibee Kuneez Fatima* v *Bibee Saheba Jan*, 8 W. R., 313.

Frame of suit.

The plaintiff should sue on behalf of himself and the other persons interested in the due performance of the trust, stating what breaches of trust have been committed, and praying that the trustee may be removed; that some proper person may be appointed in his place; that a scheme may be framed for the purpose of having the breach of trust rectified and properly carried out in future; and for an account—*Kalee Churn Giri* v. *Golabi*, 2 C. L. R, 131; *Rup Narain Singh* v. *Junko Bye*, 3 C. L. R., 115.

It is not necessary to show that the endowment was one which was formerly under the control of the Board of Revenue.—*Ganes Singh* v. *Ramgopal Singh*, 5 B. L. R., Appx., 55.

Act does not apply to wrong-doers.

These sections as to suits deal only with the trustees, managers, superintendents, and committees of temples for acts done by them while filling the office of trustee, manager, superintendent, or committee, and do not apply to persons who, without any authority, by election,

APPDX.

appointment, or otherwise, have intruded themselves into the management of a temple and possession of its properties.—*Sabapathi* v. *Subraya*, I. L. R., 2 Mad., 58.

The jurisdiction given to Courts by this Act cannot be excluded by any clause in a deed of endowment.—*Syud Imdad Hossein* v. *Mahomed Ali Khan*, 23 W. R., 150.

An appeal does not lie from an order passed under this Act, but the party dissatisfied with the order may seek to set it aside by a regular suit.—*Kudeeram Singh* v. *Sham Singh Poojoory*, W. R., Sp. (Mis.), 25; *Delrus Banoo Begum* v. *Hadjee Aboor Ruhman*. 21 W. R., 368.

Reference to arbitrators.

XVI. In any suit or proceeding instituted under this Act, it shall be lawful for the Court before which such suit or proceeding is pending, to order any matter in difference in such suit to be referred for decision to one or more arbitrators. Whenever any such order shall be made, the provisions of chapter vi of the Code of Civil Procedure shall, in all respects, apply to such order and arbitration, in the same manner as if such order had been made on the application of the parties under s. 312 of the said Code.

See now Act X of 1877, chap. xxxvii, and s. 506.

Reference under s. 312 of Civil Procedure Code.

XVII. Nothing in the last preceding section shall prevent the parties from applying to the Court, or the Court from making the order of reference under the said s. 312 of the said Code of Civil Procedure.

See now Act X of 1877, s. 506.

Preliminary application for leave to institute suit.

XVIII. No suit shall be entertained under this Act without a preliminary application being first made to the Court for leave to institute such suit. The application may be made upon unstamped paper. The Court, on the perusal of the application, shall determine whether there are sufficient *primâ facie* grounds for the institution of a suit, and if in the judgment of the Court there are such grounds, leave shall be given for its institution. In calculating the costs at the termination of the suit, the stamp-duty on the preliminary application shall be estimated, and shall be added to the costs of the suit. If the Court shall be of opinion that the suit has been for the benefit of the trust, and that no party to the suit is in fault, the Court may order costs, or such portion as it may consider just, to be paid out of the estate.

Costs.

Section 18 of Act XX of 1863 applies only to such religious establishments as were under the control or superintendence of the Board of Revenue or of local agents under Reg. XIX of 1810, and were transferred to trustees or managers under s. 4 of the Act.—*Delroos Banoo Begum* v. *Nawab Syud Ashgur Ally Khan*, 15 B. L. R, 167; S. C., 23 W. R., 453.

A, a Mahomedan lady, executed a wuqfnama, purporting to dedicate the whole of her property to an imambara in her house, for the purpose of perpetuating various Shiah ceremonies. By the wuqfnama she

constituted herself joint-mutawali with one *B*, and caused the name of herself and *B* as mutawalis to be substituted in the Collector's register for her own name as owner. On the death of *B*, *A* acted as the sole mutawali. The wuqfnama was publicly registered. But though the property was styled 'wuqf' and *A* the mutawali in all documents connected with the estate, *A* continued to deal with it as absolute owner, and the dedication, though made in 1852, was never under the control of the Board of Revenue or of local agents. In a suit, which the plaintiffs obtained leave to institute, under s. 18 of Act XX of 1863, to remove *A* from the mutawaliship, on the ground of misfeasance, it was held, that the wuqfnama did not constitute a public religious establishment within the meaning of Act XX of 1863, and that therefore the Judge below had no authority to give the plaintiffs leave to sue under s. 18, and that his decision was consequently *ultra vires*.—*Delroos Banoo Begum* v. *Nawab Syud Ashgur Ally Khan*, 15 B. L. R., 167; S. C., 23 W. R., 453.

The suits mentioned in the Act as needing the authority of the Court for their institution, are solely suits charging trustees, managers, or committees with misfeasance, malversation of the temple property, or neglect of duty There is nothing in the Act to oust the jurisdiction of the ordinary Courts over suits to establish a right to share in the management.—*Agri Sharma Embrandri* v. *Vistnu Embrandri*, 3 Mad. H. C. R., 198.

The Act, while it empowers persons to sue whose right to sue, independently of the Act, may be doubtful, does not deprive persons, claiming to be beneficiaries under a deed of endowment, of the right to sue which they have independently of the Act: nor does it impose on them the necessity of obtaining the sanction to institute the suit required by s. 18 of the Act.—*Hajee Kalub Hossein* v. *M. S. Mehrum Beebee*, 4 N. W. P., 155; *Jeyangarulavaru Sri Hati Durma Dossji*, 4 Mad. H. C. R., 2.

An appropriator, who sues on the ground that the trust created, so far as it relates to the appointment of mutawalis, has never been acted upon, and that the original rights of the appropriator remain, is at liberty to bring such a suit without the leave of the Court under s. 18 of Act XX of 1863.—*Hidait-oon-nissa* v. *Syud Afzul Hossein*, 2 N. W. P., 420.

The committee of a district duly appointed under Act XX of 1863 are entitled to maintain a suit in the Civil Court without having obtained the leave of the Court to bring the suit, as well when the object of the suit is to establish their right of control under s. 3 of the Act, as when it is sought to enforce such control against the officers of the temple subordinate to them.—*Venkatasa Naidu* v. *Sadagopasamy Iyer*, 4 Mad. H. C. R., 404.

An order of the Civil Court under this section refusing leave to institute a suit, and deciding that an endowment is governed in a particular manner is not apparently conclusive upon the question of title between the parties.—*Venkatasa Naiker* v. *Srinivassa Chariyar*, 4 Mad. H. C. R., 410.

It is the duty of the Court acting under s. 18 of Act XX of 1863 to see that there are some sufficient grounds for giving a person permission to institute a suit under the provisions of the Act, for such permission does not only contemplate that the Court may remove such trustee, manager, superintendent, or member of a committe entrusted with the management of the endowed property, but it also contemplates that the Court shall call upon such trustee, manager, superintendent, or member of a committee to file in Court an account of his trust.—*Kishore Bon Mohunt* v. *Kalee Churn Giree*, 22 W. R., 364.

No order for costs out of the estate can be made where a party to the suit is in fault.—*Sookram Doss Mohunt* v. *Nund Kishore Doss Mohunt*, 22 W. R., 21.

APPDX.

Court may require accounts of trust to be filed.

XIX. Before giving leave for the institution of a suit, or after leave has been given, before any proceeding is taken, or at any time when the suit is pending, the Court may order the trustee, manager, or superintendent, or any member of a committee, as the case may be, to file in Court the accounts of the trust, or such part thereof as to the Court may seem necessary.

No civil suit to bar proceedings for criminal breach of trust.

XX. No suit or proceeding before any Civil Court, under the preceding sections, shall in any way affect or interfere with any proceeding in a Criminal Court for criminal breach of trust.

See *Anon.*, I. L. R., 1 Mad., 55.

Provision for cases in which the endowments are partly for religious and partly for secular purposes.

XXI. In any case in which any land or other property has been granted for the support of an establishment partly of a religious and partly of a secular character, or in which the endowment made for the support of an establishment is appropriated partly to religious and partly to secular uses, the Board of Revenue, before transferring to any trustee, manager, or superintendent, or to any committee of management appointed under this Act, shall determine what portion, if any, of the said land or other property shall remain under the superintendence of the said Board for application to secular uses, and what portion shall be transferred to the superintendence of the trustee, manager, or superintendent, or of the committee, and also what annual amount, if any, shall be charged on the land or other property which may be so transferred to the superintendence of the said trustee, manager, or superintendent, or of the committee, and made payable to the said Board or to the local agents for secular uses as aforesaid. In every such case the provisions of this Act shall take effect only in respect to such land and other property as may be so transferred.

Government not to hold charge henceforth of property for support of any mosque, temple, &c.

XXII. Except as provided in this Act, it shall not be lawful, after the passing of this Act, for any Government in India, or for any officer of any Government in his official character, to undertake or resume the superintendence of any land or other property granted for the support of, or otherwise belonging to, any mosque, temple, or other religious establishment, or to take any part in the management or appropriation of any endowment made for the maintenance of any such mosque, temple, or other establishment, or to nominate or appoint any trustee, manager, or superintendent thereof, or to be in any way concerned therewith.

XXIII. Nothing in this Act shall be held to affect the provisions of the Regulations mentioned in this Act, except in so far as they relate to mosques, Hindoo temples, and other religious establishments; or to prevent the Government from taking such steps as it may deem necessary under the provisions of the said Regulations, to prevent injury to and preserve buildings remarkable for their antiquity, or for their historical or architectural value, or required for the convenience of the public.

Effect of Act in respect of Regulations therein mentioned and of buildings of antiquity, &c.

XXIV. The word 'India' in this Act shall denote the territories which are or may become vested in Her Majesty by the Statute 21 and 22 Vic., c. 106, entitled "an Act for the better government of India."

'India.'

OFFICIAL TRUSTEES' ACT.

ACT XVII OF 1864.

An Act to constitute an office of Official Trustee.

WHEREAS it is expedient to amend the law relating to Official Trustees, and to constitute an office of official trustee; It is enacted as follows:—

Preamble.

I. The following words and expressions in this Act shall have the meanings hereby assigned to them, unless there be something in the context repugnant to such construction, that is to say:—

Interpretation.

The expression 'High Court' shall mean Her Majesty's High Courts of Judicature at Fort William in Bengal, Fort St. George, and Bombay respectively, in the exercise of their original civil jurisdiction.

'High Court.'

The expression 'Chief Justice' shall mean the Chief Justice or Acting Chief Justice for the time being of any of the said High Courts.

'Chief Justice.'

The word 'person' shall include a corporation.

'Person.'

Words importing the singular number shall include the plural, and words importing the plural number shall include the singular.

Number.

Words importing the masculine gender shall include females.

Gender.

II. Act XVII of 1843 (for the appointment of Official Trustees in certain cases) is hereby repealed, except as to any proceedings pending, or any trusts now vested in an Official Trustee under it, and except in so far as that Act is made applicable to the Settlement of Prince of Wales' Island, Singapore, and Malacca, by Act XIV of 1852 (for extending the provisions of Acts XXIV of 1841 nd XVII of 1843 to the Straits' Settlement.)

Act XVII of 1843 repealed.

APPDX.

Official trustee under Act XVII of 1843 to act as if appointed under this Act, save as regards remuneration.

III. Every Official Trustee appointed under the said Act XVII of 1843 shall, save as regards the remuneration to be received by him, hold and execute the trusts of which he is trustee, in all respects as if he were an Official Trustee appointed under this Act.

An Official Trustee to be appointed in each Presidency.

IV. In each of the Presidencies of Fort William in Bengal, Fort St. George, and Bombay, there shall be an Official Trustee. The said Official Trustees shall be called the Official Trustee of Bengal, the Official Trustee of Madras, and the Official Trustee of Bombay respectively.

Appointment, suspension, and removal of Official Trustee.

V. Every Official Trustee appointed under this Act shall be appointed and may be suspended or removed from his office by the authorities hereinafter named, that is to say—

The Official Trustee of Bengal, by the Chief Justice of Her Majesty's High Court of Judicature at Fort William in Bengal.

The Official Trustee of Madras, by the Chief Justice of Her Majesty's High Court of Judicature at Fort St. George.

The Official Trustee of Bombay, by the Chief Justice of Her Majesty's High Court of Judicature at Bombay.

Administrator-General may be appointed Official Trustee.

VI. The Administrator-General or Officiating Administrator-General for the time being of any of the said Presidencies shall be eligible for the office of Official Trustee of that Presidency. Every Official Trustee appointed under this Act shall give security for the due execution of the duties of his office in such manner and to such amount as the Chief Justice by whom he is appointed shall direct.

Security to be given by Official Trustee.

Leave of absence of Official Trustee, and appointment of a person to officiate for him.

VII. It shall be lawful for the Chief Justice of the High Court at any of the Presidencies, from time to time, to grant leave of absence to the Official Trustee of that Presidency, but subject always to such and the like rules as may be for the time being in force as to leave of absence of officers attached to such High Court. Whenever any Official Trustee shall obtain leave of absence, it shall be lawful for the Chief Justice to appoint some person to officiate as Official Trustee, and such person, while so officiating, shall be subject to the same conditions and be bound by the same responsibilities as the Official Trustee, and he shall be deemed to be the Official Trustee for the time being under this Act, and shall be liable to give security for the due execution of the duties of his office in like manner as if he had been appointed Official Trustee.

VIII. If any person shall be about to grant, assign or settle any property, moveable or immoveable, of what nature or kind soever, upon or subject to any trust, whether for a charitable purpose or otherwise, it shall be lawful for such person, with the consent of the Official Trustee, to appoint him, by the deed creating the trust, to be the trustee of such settlement; and upon such appointment the property so granted, assigned, or settled shall vest in such officer and his successors in office, and shall be held by him and them upon the trust declared and contained in the said deed. Provided always, that the consent of the Official Trustee shall be recited in the said deed, and that the deed shall be duly executed by the Official Trustee: provided also, that no trust for any religious purpose shall ever be held by the Official Trustee, under this or under any other section of this Act.

Official Trustee may, with his consent, be appointed trustee of a settlement by grantor, &c.

IX. Every Official Trustee appointed trustee of any property under the last preceding section shall be entitled to receive, by way of remuneration in that behalf, such sum or sums only as he shall, by the deed of settlement, be declared to be entitled to receive.

Official Trustee appointed under last preceding section to receive only the remuneration specified in the deed.

X. If any property is subject to a trust, whether for a charitable purpose or otherwise, and there shall be no trustee willing to act or capable of acting in the trusts thereof, who is within the local limits of the ordinary or extraordinary original civil jurisdiction of the High Court, or if property is subject to a trust, and all the trustees, or the surviving or continuing trustee, and all the persons beneficially interested in the said Trust, shall be desirous that the Official Trustee shall be appointed in the room of such trustees or trustee, then, and in any such case, it shall be lawful for the High Court, on petition, and with the consent of the Official Trustee, to appoint the Official Trustee to be the trustee of such property: and upon such appointment such property shall vest in the Official Trustee and his successors in office, and shall be held by him and them upon the same trusts as the same were held previous to such appointment.

Under what other circumstances Official Trustee may be appointed trustee of any property.

XI. The Official Trustee shall be entitled by way of remuneration, in respect of all trust-property transferred to him under the last preceding section, to a commission, the rate of which shall be as follows, that is to say,—

Rate of commission under last preceding section.

On all capital monies received by him,—a commission of one-half per cent. on receiving the same.

APPDX.

On all capital monies invested by him,—a commission of one-half per cent. on investing the same.

On all sums received by him by way of interest or dividends in respect of monies invested,—a commission of three-quarters per cent.

On all rents collected by him,—a commission of two and-a-half per cent.

What expenses, &c., commission to cover.

XII. The Official Trustee shall defray all the expenses of the establishment necessary for his office, including the provision of office accommodation, together with all other charges to which the said office shall be subject, except those for which express provision is made by this Act, and except those costs of litigation and the like which a trustee would, under ordinary circumstances, be entitled to pay for out of the trust-monies in his hand. The commission to which the Official Trustee shall be entitled is intended to cover all the expenses and risk and responsibility of management, collection, and distribution.

In all cases Official Trustee to be sole trustee.

XIII. It shall in no case be lawful to appoint the Official Trustee to be a trustee along with any other person: but the Official Trustee shall always be sole trustee.

In what securities Official Trustee to invest trust-money.

XIV. The Official Trustee shall cause all capital monies received by him to be invested in Government securities, or otherwise as the Court shall direct: and if in any case the trust-funds or any part of them shall, at the time of their vesting in the Official Trustee, be invested otherwise than as provided in the deed or will creating the trust, or than as ordered by the Court, it shall be the duty of the Official Trustee, as soon as he reasonably can, to realize the funds so improperly invested, and to invest the same in Government securities, or otherwise as the Court shall direct.

High Court may make orders respecting trust-property vested in Official Trustee.

XV. The High Court may make any such orders as shall seem to it necessary respecting any trust-property vested in the Official Trustee, or the interest or produce thereof. All such orders shall be made on petition, unless the Court shall direct a suit to be instituted.

Re-transfer of trust-property to original, or transfer to other, trustees.

XVI. Nothing in this Act shall prevent the re-transfer of any trust-property, which may have become vested in the Official Trustee, to the original or any subsequently appointed trustee, or to such person as the Court shall direct, unless otherwise provided by the deed or will creating the trust.

XVII. All orders which shall be made appointing any Official Trustee to act as trustee in virtue of his office, shall appoint him by his name of office, and shall authorize the Official Trustee for the time being of the same Presidency to act as Official Trustee of the property to which such order shall relate; and all property and interest which at the time of the death, resignation, or removal from office of any Official Trustee shall be vested in him by virtue of such order, shall, upon such death, resignation, or removal, cease to be vested in him, and shall vest in his successor in office immediately upon his appointment thereto, and all books, papers, and documents kept by such Official Trustee, by virtue of his office, shall be transferred to and vested in his successor in office.

Order of appointment of Official Trustee.

On death, &c., of Official Trustee, property to vest in his successor.

XVIII. All actions, suits, or other proceedings, which shall be commenced by or against any Official Trustee in his official character, may be brought by or against him by his name of office; and no suit, action, or other proceeding already commenced, or which shall be commenced, by or against any person as Official Trustee either alone or jointly with any other person, shall abate by reason of the death, resignation, or removal from office of any such Official Trustee; but the same may, by order of the Court, and upon such terms as to the serivce of notices or otherwise as the Court may direct, be continued against his successor immediately upon his appointment in the same manner as if no such death, resignation, or removal had occurred. Provided, that nothing herein contained shall render any such successor personally liable for any costs incurred prior to the order for continuing the action or suit against him, or shall release an Official Trustee who has resigned or been removed from his office, or the heirs, executors, administrators, or representatives of a deceased Official Trustee from being liable for any such costs.

Official Trustee to sue or be sued by his name of office. Suit not to abate by death, &c.

Proviso.

XIX. Every Official Trustee appointed under this Act shall enter into books, to be kept by him for that purpose, separate and distinct accounts of each trust of which he is the trustee, and of all such sums of money and securities for money, goods, and things, as shall come to his hands, or to the hands of any person employed by him, or in trust for him, under this Act, and likewise of all payments made by him on account of such trust, and of all debts due by or to the same, specifying the dates of such receipts and payments respectively, which said books shall

Official Trustee to keep a separate account of each trust, to be open to the inspection of the Chief Justice and of any person authorized by him to demand inspection.

APPDX. be kept in the Official Trustee's office, and shall be at all times open for the inspection of the Chief Justice and of any person authorized by him to demand inspection thereof.

Chief Justice may make and alter rules and orders for custody of trust-funds, &c.

XX. The Chief Justice shall have power, from time to time, to make and alter any general rules and orders consistently with the provisions of this Act, for the safe custody of the trust-funds and securities which shall come to the hands or possession of the Official Trustee, and for the remittance to Europe, or elsewhere, of all sums of money which shall be payable or belong to persons resident in Europe or elsewhere, or in other cases where such remittances shall be required, and generally for the guidance and government of the Official Trustee in the discharge of his duties; and may, by such rules and orders, amongst other things, direct what books, accounts, and statements in addition to those mentioned in this Act, shall be kept by the Official Trustee, and in what form the same shall be kept, and what entries the same shall contain, and where the same shall be kept, and where and how the funds and securities and other the property belonging to the trust, of which the Official Trustee is the trustee, shall be kept or invested or deposited, and how any remittances thereof shall be made.

Publication of orders, &c.

XXI. Such orders shall be published in the Official Gazette, and it shall be the duty of the several Official Trustees to obey and fulfil the same, and the same shall be a full authority and indemnity for all persons acting in pursuance thereof.

Official Trustee to furnish annual schedules, which shall be filed in the High Court.

XXII. The Official Trustee of each of the said Presidencies shall, once in every year,—that is to say, on the first day of March, or on such other day as the Chief Justice shall direct,—deliver to the Chief Justice a true schedule showing the gross amount of all sums of money received or paid by him on account of each trust of which he is the trustee, and the balances during the year ending on the thirty-first day of December next before the day of delivering such schedule, and a true list of all securities accrued on account of each of the said trusts during the same period; and also a true schedule of all trusts which shall have come to an end or of which the Official Trustee shall have ceased to be the trustee, and the property subject to which shall have seen paid or made over to the persons entitled to the same or to new trustees during the same period, specifying the nature and amount or value of such property and the persons to whom paid or made over. The Chief Justice shall cause the said schedule to be filed as record in the High Court; but it shall not be lawful for any

Inspection of schedules so filed.

person to inspect the same or to make copies thereof or of any part thereof, except on an order granted by the Chief Justice permitting him so to do.

Chief Justice to appoint auditors.

XXIII. The Chief Justice shall, from time to time, appoint an auditor or auditors to examine the accounts of the Official Trustee at the time of the delivery of the said schedule, and also at any other time when the Chief Justice shall think fit.

Auditors to examine schedules and accounts of Official Trustee, and to report to Chief Justice.

XXIV. The auditor or auditors shall examine the schedules and accounts, and report to the Chief Justice whether they contain a full and true account of everything which ought to be inserted therein, and whether the books which by this Act are, or which by any such general rules and orders as aforesaid shall be, directed to be kept by the Official Trustee, have been duly and regularly kept; and whether the trust-funds and securities have been duly kept and invested and deposited in the manner prescribed by this Act or which shall be prescribed by any such rules and orders to be made as aforesaid.

Auditors to have power to summon witnesses and to call for books, &c.

XXV. Every auditor shall have power to summon as well the Official Trustee as any other person or persons whose presence he may think necessary, to attend him from time to time; and to examine the Official Trustee or other party or parties, if he shall think fit, on oath or solemn affirmation, to be by him administered; and to call for all books, papers, vouchers, and documents, which shall appear to him to be necessary for the purposes of the said reference; and if the Official Trustee or other person or persons when summoned shall refuse, or, without reasonable cause, neglect to attend or to produce any book, paper, voucher, or document required, or shall attend and refuse to be sworn or make a solemn affirmation, when by law an affirmation may be substituted for an oath, or shall refuse to be examined, the auditor or auditors shall certify such neglect or refusal in writing to the High Court; and every person so refusing or neglecting shall thereupon be punishable in like manner as if such refusal or neglect had been in contempt of the said High Court.

Penalty for refusal or neglect to attend, &c., to produce books, &c.

Costs of preparing schedules, &c., how to be paid.

XXVI. The costs and expenses of preparing the said schedules and accounts, and of every such reference and examination as aforesaid, shall be defrayed by all the trust-estates to which such schedules or accounts shall relate, which costs and expenses, and the portion thereof to be contributed by each of

APPDX. the said trust-estates, shall be ascertained and settled by the auditor or auditors, subject to the approval of the Chief Justice, and shall be paid out of the said estates accordingly by the Official Trustee.

Matters to be reported by auditors.

XXVII. If upon any such reference and examination the auditor or auditors shall see reason to believe that the said schedules do not contain a true and correct account of the matters therein contained, or which ought to be therein contained, or that the trust-funds and securities have not been duly kept and invested or deposited in the manner directed by this Act, or which shall be directed by any such rules and orders as aforesaid, or that the Official Trustee has failed to comply with the provisions and directions of this Act, or of any such rules and orders, he or they shall report accordingly to the Chief Justice.

Proceedings upon such report.

XXVIII. The Chief Justice may refer every such report as last aforesaid to the consideration of the Advocate-General for the Presidency, who shall thereupon, if he shall think fit, proceed summarily against the defaulter or his personal representative in the High Court by petition for an account, or to compel obedience to this Act or to such rules and orders as aforesaid, or otherwise as he may think fit, in respect of all or any of the trust-estates then or formerly under the charge of such defaulter; and the Court shall have power, upon any such petition, to compel the attendance in Court of the defendant or defendants and any witnesses who may be thought necessary, and to examine them orally or otherwise as the said Court shall think fit, and to make and enforce such order or orders as the Court shall think just.

Costs upon such proceedings, &c., how to be defrayed.

XXIX. The costs, including those of the Advocate-General, and of the reference to him, if the same shall be directed by the Court to be paid, shall be defrayed either by the defendant or defendants, or out of the trust-estates ratably as the said Court shall direct; and whenever any costs shall be recovered from the defendant or defendants, the same shall be repaid to the estates by which the same shall have been in the first instance contributed, and the Court shall have power to order the Official Trustee or other person or persons, defendants, to receive his or her costs out of the said estates, if it shall think fit.

Orders of the High Court to have same effect, and to be executed in the same manner as decrees.

XXX. Any orders which shall be made by any of the said High Courts shall have the same effect and be executed in the same manner as decrees.

XXXI. Any order under this Act may be made on the application of any person beneficially interested in any trust-property, or of any trustee thereof, whether under disability or not.

Who may apply for order under this Act.

XXXII. If any infant or lunatic shall be entitled to any gift or legacy or residue or share thereof, it shall be lawful for the executor or administrator by whom such legacy, residue, or share may be payable or transferable, or the party by whom such gift may be made, or any trustee of such gift, legacy, residue, or share, to pay or transfer the same to the Official Trustee appointed under this Act; provided that the leave of the High Court to make such payment or transfer shall be first obtained by motion made on petition. Any money or property paid or transferred to the Official Trustee or vested in him under this section shall be subject to the same provisions as are contained in this Act as to other property vested in such Official Trustee under the provisions thereof.

Executor or Administrator may, by leave of the High Court, pay to Official Trustee, legacy, share, &c., to which an infant or lunatic is entitled.

THE INDIAN TRUSTEE ACT, 1866.

ACT No. XXVII OF 1866.

An Act to consolidate and amend the law relating to the conveyance and transfer of property in British India vested in mortgagees and trustees in cases to which English law is applicable.

WHEREAS it is expedient to consolidate and amend the laws relating to the conveyance and transfer of moveable and immoveable property in British India vested in mortgagees and trustees, in cases to which English law is applicable; It is hereby enacted as follows (*a*):—

Preamble.

(*a*) As to the meaning of these words, see *ante*, p. 15. The Court has no jurisdiction under this Act to decide on a disputed question of title.—*In re Draper's Settlement*, 9 W. R. (Eng.). 805.

The Act applies only to the Lower Provinces, the North-Western Provinces, the Presidencies of Madras and Bombay, and the Punjab. It is mainly founded on the English Statutes, 13 and 14 Vict., c. 60 (The Trustee Act), and 15 and 16 Vict., c. 55 (The Trustee Extension Act).

I. [*Repealed by Act XIV of* 1870.]

Interpretation.

II. In this Act, unless there be something repugnant in the subject or context—

'Immoveable property' shall extend to and include messuages, tenements, and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein:

'Immoveable property.'

APPDX.

'Stock.'

'Stock' shall mean any fund, annuity, or security transferable in books kept by any company or society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share (*a*) or interest therein. It shall also include shares in ships registered under the Merchant Shipping Act, 1854, or at any port in British India (*b*):

'Hold' and 'holding.'

'Hold' and 'holding' shall be applicable to any vested estate, whether for life or of a greater or less description, in possession, futurity, or expectancy in any immoveable property:

'Contingent right.'

'Contingent right,' as applied to immoveable property, shall mean a contingent or executory interest, or possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained; also a right of entry, whether immediate or future, and whether vested or contingent:

'Convey' and 'conveyance.'

'Convey' and 'conveyance' applied to any person shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another immoveable property which such person holds, or in which he is entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants-in-tail in accordance with the provisions of Act XXXI of 1854 (*to abolish real actions and also fines and recoveries, and to simplify the modes of conveying land in cases to which English law is applicable*):

'Transfer.'

'Transfer' shall mean the execution and performance of every deed and act by which a person entitled to stock, or Government securities, can transfer such stock or Government securities from himself to another:

'High Court.'

'High Court' shall mean every Court now or hereafter to be established under the Statute 24 and 25 Vict., cap. 104, and also the Chief Court of the Punjab, or such one or more Judges of the said Courts respectively as shall be appointed by the Chief Justice or the senior Judge (*c*), as the case may be, to entertain applications and make orders under this Act:

'Trust;' 'trustee.'

'Trust' shall not mean the duties incident to an estate conveyed by way of mortgage; but with this exception, the words 'trust' and 'trustee' shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the

subject of the trust, and shall extend to and include the duties incident to the office of executor or administrator of a deceased person (*d*):

'Lunatic.'

'Lunatic' shall mean any person who shall have been found by due course of law to be of unsound mind and incapable of managing his affairs:

'Person of unsound mind.'

'Person of unsound mind' shall mean any person not a minor who, not having been found to be a lunatic, shall be incapable from infirmity of mind (*e*) to manage his own affairs:

'Heir' and 'devisee.'

In the case of a will made, or an intestacy occurring before the first day of January, 1866 (*the day on which the Indian Succession Act came into force*) 'heir' shall mean the person claiming an interest in the immoveable property of a deceased person under the laws concerning descent applicable to such property; and 'devisee' shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the immoveable property of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent.

In the case of a will made, or an intestacy occurring on or after the first day of January, 1866, 'heir' shall mean any person claiming an interest in the immoveable property of a deceased person under the rules for the distribution of an intestate's estate; and 'devisee' shall mean any person taking immoveable property under a bequest, and any person, other than an executor or administrator, claiming an interest in immoveable property, not as entitled thereto under the said rules, but by a title dependent solely upon the operation of the laws concerning intestate and testamentary succession:

'Mortgage.'

'Mortgage' shall be applicable to every estate or interest in immoveable or moveable property which would in the High Court be deemed merely a security for money:

'Person.'

'Person' shall include any company or association, or body of persons, whether incorporated or not (*f*).

Number and gender.

Words importing the singular number only shall extend to several persons or things; words importing the plural number shall apply to one person or thing; words importing the masculine gender shall extend to a female (*g*).

The preceding definitions correspond substantially with those in the Trustee Act, 1850, 13 and 14 Vict., c. 60.

APPDX.

(a) See *Re Angelo*, 5 De G. and S., 278.
(b) 18 and 19 Vict., c. 91, s. 10.
(c) See Act IV of 1866, s. 3.
(d) A vendor, after a contract, has been held to be a trustee of shares in a joint-stock bank for the purchaser. But in cases of immoveable property, if not universally, at least where the alleged trustee can possibly dispute the trust, the constructive trust must first have been declared by the decree of the Court, and the infant heir of the vendor, who died intestate after having contracted to sell real estate, is not a constructive trustee for the purchaser unless so declared by decree.—Lewin, 7th Edn., 867. See *Re Lowry's Will*, L. R., 15 Eq., 78. A vendor who refused to convey after tender of a deed settled by the Judge, or to receive the purchase-money, was declared a trustee; and on the purchaser paying his purchase-money into Court, his solicitor was to execute the conveyance for the vendor.—*Warrender* v. *Foster*, 1 Set. on Decrees, 4th Ed., 538.

The Court has jurisdiction to recognize a constructive trusteeship of stock within the meaning of that term as used in the Act.—*Re Davis's Trust*, L. R., 12 Eq., 214.

The definition of 'trustee' includes the case of stock which has been transferred into the name of an infant, who is the sole beneficial owner, subject to a direction in regard to maintenance or otherwise, vested in some one else.—*Gardner* v. *Cowles*, L. R., 3 Ch. D., 304.

An heir who elects to hold on the trusts of an inoperative will is a trustee.—*Dewar* v. *Maitland*, L. R., 2 Eq., 834. After a bankruptcy and the appointment of assignees, one of them went abroad; it was held, that he was a trustee, and the estate was vested in the remaining assignees.—*In re Joyce's Estate*, L. R., 2 Eq., 576.

(e) See *Re Wakeford*, 1 J. and Lat., 2; *Re Jones*, 6 Jur., 545.
(f) See *Lackersteen* v. *Rostan*, I. L. R., 7 Calc., 32.
(g) See the General Clauses Act, I of 1868.

The High Courts to have jurisdiction in what cases.

III. The powers and authorities given by this Act to the High Courts shall and may be exercised only in cases to which English law is applicable (a), and may be exercised with respect to property within the local limits of the extraordinary original civil jurisdiction of the said Courts respectively.

(a) Up to a very recent period, the words "cases to which English law is applicable" have been considered to apply only to cases in which the parties have been European British subjects. In *Re Kahandas Narandas*, I. L. R., 5 Bomb., 154, however, it was held, that the High Courts may exercise the summary powers conferred upon them by this section in the case of Hindu trusts; *ante*, p. 15.

High Court may convey estates of lunatic trustees and mortgagees.

IV. When any lunatic or person of unsound mind (a) shall hold any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order that such property be vested (b) in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect

as if the trustee or mortgagee had been sane, and had duly executed a conveyance of the property in the same manner for the same estate.

Trustee Act, 1850, s 3.

(*a*) Where the unsoundness of mind is contested, the case is not within the Act.—*Re Walker*, Cr. and Ph., 147; *Re Campbell*, 18 L. T, 202.

(*b*) The vesting order being a conveyance, should be so worded as to make it clear by the description what property passes.—*Re Ord's Trust*, 3 W. R. (Eng.), 863. Where the circumstances require a severance of the property, the Court will make two vesting orders instead of one general. —*Brader* v. *Kerby*, W. N., 1872, p. 174; see Lewin, 7th Ed., 869.

High Court may convey contingent rights.

V. When any lunatic or person of unsound mind shall be entitled to any contingent right in any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the said High Court shall direct, and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right.

The Trustee Act, 1850, s. 4.

High Court may transfer stock or Government securities of lunatic trustees and mortgagees.

VI. When any lunatic or person of unsound mind shall be solely entitled to any stock or Government securities, or to any thing in action upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order vesting in any person or persons the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof (*a*): and when any person or persons shall be entitled jointly with any lunatic or person of unsound mind to any stock or Government securities, or thing in action upon any trust or by way of mortgage, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid (*b*), or in such last-mentioned person or persons, together with any other person or persons the said High Court may appoint (*c*).

Trustee Act, 1850, s. 5.

(*a*) Where a person of unsound mind was entitled to a sum of stock as trustee, and also entitled to another sum of the same stock beneficially, as the bank would not apportion the past dividend between the trust-estate and the beneficial estate, the Court, in appointing new trustees, vested the right to receive the whole dividend in the new trustees upon their undertaking that they would invest in the name of

APPDX.

the old trustee so much as belonged to him beneficially.—*Re Stewart*, 2 DeG. F. and J., 1; *Hodges* v. *Wheeler*, 1 Set. on Dec., 4th Ed., 522; Lewin, 7th Ed., 870.

(*b*) When one of the three executors of a surviving trustee of shares was of unsound mind, and the other two, when applied to by the persons absolutely entitled to the shares, declined to do anything, it was held, that an order could be made vesting the right to transfer the shares in the persons beneficially interested.—*In re White*, L. R., 5 Chan., 698.

(*c*) The lunatic husband of a married woman, a trustee, is within the Act.—*Re Wood*, 3 D. F. J., 125; *Ex parte Bradshaw*, 2 D. M. G., 900.

Power to transfer stock or Government securities of deceased person.

VII. When any stock or Government securities shall be standing in the name of any deceased person whose executor or administrator is a lunatic or person of unsound mind, or when any thing in action shall be vested in any lunatic or person of unsound mind as the executor or administrator of a deceased person, it shall be lawful for the High Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, in any person or persons the said Court may appoint.

Trustee Act, 1850, s. 6.

High Court may convey estates of minor trustees and mortgagees.

VIII. When any minor shall hold any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order vesting such property in such person or persons in such manner and for such estate as the said Court shall direct (*a*); and the order shall have the same effect as if the minor trustee or mortgagee had attained his majority, and had duly executed a conveyance of the property in the same manner for the same estate (*b*).

Trustee Act, 1850, s. 7.

(*a*) As to barring dower, see Lewin, 7th Ed, 871.

(*b*) See *Powell* v. *Mathews*, 1 Jur., N. S., 973.

An order has been made to vest the legal estate in the devisees of a mortgagor subject to a charge created by his will.—*Re Ellorthorpe*, 18 Jur., 669.

Contingent rights of minor trustees and mortgagees.

IX. When any minor shall be entitled to any contingent right in any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the said Court shall direct, and the order shall have the same effect as if the minor had attained his majority and had duly executed a deed so releasing or disposing of the contingent right.

Trustee Act, 1850, s. 8.

X. When any person solely (*a*) holding any immoveable property upon any trust (*b*) shall be out of the jurisdiction of the High Court (*c*), or cannot be found (*d*), it shall be lawful for the said Court (*e*) to make an order vesting such property in such person or persons in such manner and for such estate as the said Court shall direct, and the order shall have the same effect as if the trustee had duly executed a conveyance of the property in the same manner and for the same estate.

High Court may convey the estate of a trustee out of the jurisdiction of the Court.

Trustee Act. 1850, s. 9.

(*a*) As to coparceners, see *McMurray* v. *Spicer*, L. R, 5 Eq., 527.

(*b*) An heir who takes the trust-estate by the disclaimer of the trustees (*Wilks* v. *Groom*. 6 D. M. G., 205), or by the death of the trustee in the testator's lifetime (*Re Gill*, 1 Set on Dec., 4th Ed, 520), is a trustee within the section; and an heir of a mortgagee who had taken possession has been held to be a trustee for the mortgagee's executors — *Re Skitter's Mortgage*, 4 W. R. (Eng.). 791. Where a person had contracted to sell an estate, which in equity had converted it into personalty, but before he executed the conveyance died intestate, it was held that the heir was a trustee for the personal representative.—See Lewin, 7th Ed., 871, citing *Re Badcock*, 2 W. R. (Eng.), 386.

(*c*) Temporary absence does not bring a case within the Act.—*Hutchinson* v. *Stephens*, 5 Sim., 499. A trustee may be treated as out of the jurisdiction although he appears by counsel—*Stilwell* v. *Ashley*, 1 Set. on Dec., 4th Ed., 520.

(*d*) See *Leahmere* v. *Clamp*, 30 Beav., 218; 31 Beav., 578.

One of three joint mortgagees, who were trustees, went abroad, and in his absence the mortgage was paid off; and by a deed to which he, with the other trustees, was named a party, but which he never executed, the debt and security, except the legal estate outstanding in him, were vested in the transferree of the mortgagee. Afterwards a new trustee was appointed in his place. It was held, that the neglect or refusal of the old trustee to convey the outstanding legal estate brought the case within the Act, and that the Court had jurisdiction to vest the outstanding legal estate in the transferree.—*In re Walker's Mortgage Trusts*, L. R, 3 Ch. D., 209.

(*e*.) This section applies when the trustee out of the jurisdiction is of unsound mind.—*Re Gardner's Trusts*, L. R., 10 Ch. D., 29.

XI. When any person or persons shall hold any immoveable property in trust jointly with a person not within the jurisdiction of the High Court, or who cannot be found, it shall be lawful for the said Court to make an order vesting the property in the person or persons so jointly holding, or in such last-mentioned person or persons together with any other person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee (*a*) out of the jurisdiction, or who cannot be found, had duly executed a conveyance of the property in the same manner for the same estate (*b*).

High Court may make order in cases where persons hold immoveable property jointly with persons out of jurisdiction.

Trustee Act, 1850, s. 10.

(*a*) A mortgage of real estate was made by two persons, one of whom

APPDX.

went abroad. Upon a sale of the mortgaged property by the mortgagor, so much of the purchase-money as was payable to the mortgagee was invested in their joint names. It was held, that the Court had no jurisdiction upon a petition by the mortgagor and the mortgagee within the jurisdiction to make an order vesting in the purchaser the estate of the absent mortgagee.—*In re Osborn's Mortgage Trusts*, L. R., 12 Eq., 392.

(*b*) The Court has power to vest the lands in the joint owners within the jurisdiction, and another as joint tenants.—*Smith* v. *Smith*, 3 Drew., 72; *Re Marquis of Bute's Will*, Johns., 15.

If one of the co-heirs of a mortgagee be out of the jurisdiction, he is a trustee within this section for the persons entitled to the mortgage-money, and the entirety on their petition may be vested in the co-heir within the jurisdiction.—*Re Templers's Trusts*, 4 N. R., 494; *Re Hughes's Settlement*, 2 H. and M., 695. See Lewin, 7th Ed., 873.

Contingent rights of trustees.

XII. When any person solely entitled to a contingent right in any immoveable property upon any trust shall be out of the jurisdiction of the High Court, or cannot be found, it shall be lawful for the said Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the Court shall direct, and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right.

Trustee Act, 1850, s. 11.

High Court may make order in cases where persons are jointly entitled with others out of the jurisdiction of the Court to a contingent right in immoveable property.

XIII. When any person jointly entitled with any other person or persons to a contingent right in any immoveable property upon any trust shall be out of the jurisdiction of the High Court, or cannot be found, it shall be lawful for the said Court to make an order disposing of the contingent right of the person out of the jurisdiction, or who cannot be found, to the person or persons so jointly entitled as aforesaid, or to such last-mentioned person or persons, together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right.

Trustee Act, 1850, s. 12.

When it is uncertain which of several trustees was the survivor.

XIV. Where there shall have been two or more persons jointly holding any immoveable property upon any trust, and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the High Court to make an order vesting such property in such person or persons in such manner and for such estate as the

said Court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance of the property in the same manner for the same estate.

Trustee Act, 1850, s. 13.

When it is uncertain whether the last trustee be living or dead.

XV. Where any one or more person or persons shall have held any immoveable property upon any trust, and it shall not be known, as to the trustee last known to have held such property, whether he be living or dead, it shall be lawful for the High Court to make an order vesting such property in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance of the property in the same manner for the same estate.

Trustee Act, 1850, s. 14.

When trustee dies without an heir.

XVI. When any person holding any immoveable property upon any trust shall have died intestate as to such property without an heir, or shall have died, and it shall not be known who is his heir or devisee, it shall be lawful for the High Court to make an order vesting such property in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the property in the same manner for the same estate (*a*).

Trustee Act, 1850, s. 15.

(*a*) This section does not apply to leaseholds for years.—Lewin, 7th Ed., 873. But a vesting order as to leaseholds for years may be made on the appointment of new trustees under s. 36. See *Re Dalgleish's Settlement*, L. R., 4 Ch. D., 143.

Contingent right of unborn trustee.

XVII. When any immoveable property is subject to a contingent right in an unborn person, or class of unborn persons who, upon coming into existence, would in respect thereof hold such property upon any trust, it shall be lawful for the High Court to make an order which shall wholly release and discharge such property from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such person or class of unborn persons would, upon coming into existence, hold in such property.

Trustee Act, 1850, s. 16.

APPDX.

Power to make an order for vesting the estate on refusal or neglect of a trustee to convey or release.

XVIII. In every case when any person holds, or shall hold jointly or solely, any immoveable property, or is or shall be entitled to a contingent right therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance of such property, or a duly authorized agent of such last-mentioned person requiring such trustee to convey the same, or to release such contingent right, it shall be lawful for the High Court, if the said Court shall be satisfied that such trustee has wilfully refused (*a*) or neglected to convey the said property for the space of twenty-eight days after such demand (*b*), to make an order vesting such property in such person or persons in such manner and for such estate as the Court shall direct, or releasing such contingent right in such manner as the Court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance of the property, or a release of such right in the same manner and for the same estate (*c*).

Trustee Extension Act, 1852, s. 2. See further as to vesting, *ante*, pp. 334-5.

(*a*) It has been decided that a married woman is capable of refusing — *Rowley* v. *Adams*, 14 Beav., 130.

(*b*) In *Knight* v. *Knight*, W. N, 1866, p. 114. a divorced woman obtained a vesting order against her late husband.—Lewin, 7th Ed., 894.

Where a mortgagor had covenanted to surrender copyholds to his mortgagee and neglected to make such surrender within twenty-eight days after demand and tender of engrossment by the mortgagee, the Court, on the petition of the mortgagee, made a vesting order without requiring service of the petition on the mortgagor.—*In re Crowe's Mortgage*, L. R, 13 Eq., 26.

Power to convey in place of mortgagee.

XIX. When any person to whom any immoveable property has been conveyed by way of mortgage, shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance or vesting of such property, then in any of the following cases it shall be lawful for the High Court to make an order vesting such property in such person or persons in such manner and for such estate as the said Court shall direct,—that is to say—

when an heir or devisee of such mortgagee shall be out of the jurisdiction of the High Court or cannot be found;

when an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such property, or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey the same,

or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such property shall have been tendered to him by a person entitled as aforesaid, or a duly authorized agent of such last-mentioned person;

when it shall be uncertain which of several devisees of such mortgagee was the survivor;

when it shall be uncertain, as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee whether he be living or dead;

when such mortgagee shall have died intestate as to such property and without an heir, or shall have died, and it shall not be known who is his heir or devisee;

And the order of the said High Court made in any one of the foregoing cases shall have the same effect as if the heir or devisee, or surviving devisee, as the case may be, had duly executed a conveyance of the property in the same manner and for the same estate.

Trustee Act, 1850, s. 19.

Power to appoint a person to convey in certain cases.

XX. In every case where the High Court shall, under the provisions of this Act, be enabled to make an order having the effect of a conveyance of any immoveable property, or having the effect of a release or disposition of the contingent right of any person or persons born or unborn, it shall also be lawful for the High Court, should it be deemed more convenient, to make an order appointing a person to convey such property, or release or dispose of such contingent right; and the conveyance or release or disposition of the person so appointed (*a*) shall, when in conformity with the terms of the order by which he is appointed, have the same effect, in conveying the property, or releasing or disposing of the contingent right, as an order of the High Court would in the particular case have had under the provisions of this Act. In every case where the High Court shall, under the provisions of this Act, be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of any company or society established or to be established, it shall be lawful for the High Court, if it be deemed more convenient, to make an order directing the secretary or any officer of such company or society at once to transfer or join in transferring the stock to the person or persons to be named in the order (*b*); and this Act shall be a full and complete indemnity and discharge to all companies or societies and their officers and servants for all acts done or permitted to be done pursuant thereto (*c*).

Trustee Act, 1850, s. 20.

APPDX.

(*a*) The conveyance should contain a recital showing that it is made in obedience to the order of the Court, and should be executed by the person appointed to convey in his own name.—Lewin, 7th Ed., 875.

(*b*) The person here meant is not a beneficiary; but where a person has become absolutely entitled, the Court can appoint him a trustee, and direct a transfer to him.—Lewin, 7th Ed., 876.

(*c*) The Court under this section can only direct the Bank officer to transfer in the place of the person creating the difficulty; and therefore where the stock was standing in the names of two persons, one of whom was out of the jurisdiction, it was necessary to order the person within the jurisdiction to join in the transfer.—*Wade* v. *Hopkinson*; *Hodgson* v. *Hodgson*, 1 Set. on Dec., 4th Ed., 521.

When trustee of stock or Government securities out of the jurisdiction.

XXI. When any person or persons shall be jointly entitled with any person out of the jurisdiction of the High Court (*a*), or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or Government securities or thing in action upon any trust (*b*), it shall be lawful for the said Court (*c*) to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for or receive the dividends, interest, or income thereof (*d*), or to sue for or recover such thing in action or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons, together with any person or persons the said Court may appoint (*e*). When any sole trustee (*f*) of any stock, Government securities, or thing in action shall be out of the jurisdiction of the said Court, or cannot be found, or it shall be uncertain whether he be living or dead, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends (*g*), interest, or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, in any person or persons as the said Court may appoint.

Trustee Act, 1850, s. 22.

(*a*) Where the trustee out of the jurisdiction is incapacitated from lunacy or infancy, the power of the Court must be sought for in the sections applicable to cases of lunatics and infants, and not in this section.—Lewin, 7th Ed., 876; *Cramer* v. *Cramer*, 5 DeG. and Sm., 312. The fact that the trustee is out of the jurisdiction should be recited in the order.—*Re Mainwaring*, 26 Beav., 172.

(*b*) The husband of an executrix is a trustee within the Act.—*Ex parte Bradshaw*, 2 D. M. G., 900; *Re Wood*, 3 D. F. J., 125.

(*c*) A petition for a vesting order to vest property in a new trustee appointed under a power in the place of a trustee out of the jurisdiction, must be served on all the persons interested in the fund, and it must be proved by affidavit that the power has been properly exercised, and that the proposed trustee is a fit and proper person.—*Re Maynard's Settlement Trust*, 16 Jur., 1084.

(*d*) One of four trustees of a sum of stock being out of the jurisdiction, an order was made vesting the right to receive the dividends in

the other three, but was, on appeal by the bank, varied by restricting it to the dividends to accrue due during the joint lives of the three.—*Re Peyton's Settlement*, 2 De.G. and J., 290.

(*e*) Where the stock is vested in two trustees one of whom is out of the jurisdiction, the Court has no authority, under the first branch of the section, to vest the right in the person who asks for it as being absolute owner.—*Re Brass's Trust*, 4 W. R. (Eng.), 764: see Lewin, 7th Ed., 877.

(*f*) *A* and *B* being trustees, the Master found that it was uncertain whether *A* was living or dead, but *B* was living; afterwards *B* died It was held, that *A* was not a 'sole trustee.' The expression means a person originally a sole trustee, or one who has become sole trustee by surviving.—*Re Randall's Will*, 1 Drew, 401.

(*g*) This section authorizes an order vesting the right to receive future dividends.—*Re Peyton's Settlement*, 1 DeG. and J., 290.

When trustee of stock, &c, refuses to transfer.

XXII. Where any sole trustee (*a*) of any stock, Government securities, or thing in action shall neglect or refuse to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for or recover such thing in action, or any interest in respect thereof, according to the direction of the person absolutely entitled thereto (*b*), for the space of twenty-eight days next after a request in writing (*c*) for that purpose shall have been made to him by the person absolutely entitled thereto, it shall be lawful for the High Court to make an order (*d*) vesting the sole right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof (*e*), or to sue for and recover such thing in action, or any interest in respect thereof in such person or persons as the Court may appoint.

Trustee Act, 1850, s. 23.

(*a*) The words 'sole trustee' may mean all the trustees when there are more than one—*Re Hartnall*, 5 DeG. and Sm., 111; *Re Spawforth's Settlement*, 12 W. R. (Eng.), 978.

(*b*) One of several trustees of a sum of stock is not a person absolutely entitled within the meaning of this and the next section, nor is a *cestui que trust* who has only a life-interest in the dividends, at least where the application is to transfer the stock. It is doubtful whether a person having a life-interest in the dividends may be considered absolutely entitled, for the purpose of an application to receive the dividends only.—*Mackenzie* v. *Mackenzie*, 16 Jur., 723.

Duly appointed new trustees are persons 'absolutely entitled.'—*Ex parte Russell*, 1 Sim., N. S., 404; *Re Barter's Will*, 2 Sm. and Giff., Appx. v; *Re Ellis's Settlement*, 24 Beav., 426.

(*c*) As to trustee refusing, see s. 27, *post*.

(*d*) As to the person to be served, see s. 40, *post*.

(*e*) Section 27 provides for subsequently accrued dividends.

When one of several trustees of stock, &c., refuses to transfer or receive and pay over dividends.

XXIII. Where any one of the trustees of any stock, Government securities, or thing in action shall neglect or refuse to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for or recover such thing in action,

APPDX.

according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by such person, it shall be lawful for the High Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action, in the other trustee or trustees of the said stock, Government securities, or thing in action, or in any person or persons whom the said Court may appoint jointly with such other trustee or trustees (*a*).

Trustee Act, 1850, s 24.

(*a*) Where one of the three executors of a surviving trustee of canal shares was of unsound mind, and the other two, when applied to by the persons absolutely entitled to the shares, declined to do anything, it was held, that an order could be made vesting the right to transfer the shares in the persons beneficially interested.—*In re White*, L. R., 5 Chan., 698.

When stock, &c., is standing in the name of a deceased person.

XXIV. When any stock or Government securities shall be standing in the sole name of a deceased person, and his executor or administrator shall be out of the jurisdiction of the High Court, or cannot be found, or it shall be uncertain whether such executor or administrator (*a*) be living or dead, or such executor or administrator shall neglect or refuse to transfer such stock or Government securities, or receive the dividends, interest, or income thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person entitled as aforesaid, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, in any person or persons whom the said Court may appoint.

Trustee Act, 1850, s. 25.

(*a*) This section applies to a case in which the executor of a surviving trustee has not proved the will and has neglected to transfer on the requisition of new trustees appointed out of Court—*Re Ellis's Settlement*, 24 Beav., 426; and the Court seems to have made a similar order when the next-of-kin who was entitled to take out administration, had refused to make the transfer.—*In re Stroud's Trusts*, W. N., 1874, p 180; Lewin, 7th Ed., 878.

Effect of an order vesting the legal right to transfer stock, &c.

XXV. Where any order shall have been made under this Act vesting the right (*a*) to any stock or Government securities in any person or persons appointed by the High Court, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorized and empowered to execute all deeds and powers-of-attorney,

and to perform all acts relating to the transfer of such stock and Government securities into his or their own name or names, or otherwise, or relating to the receipt of the dividends, interest, or income thereof, to the extent and in conformity with the terms of such order. All companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid to the extent and in conformity with the terms of such order, as such companies, associations, or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made. After notice in writing of any such order of the High Court concerning any stock or Government securities shall have been given, it shall not be lawful for any company or association, or any person having received such notice, to act upon the requisition of the person in whose place an appointment shall have been made, in any matter relating to the transfer of such stock or Government securities or the payment of the dividends, interest, or income thereof.

Trustee Act, 1850, s. 26.
(*a*) See s. 29, *post*, and *Re Peacock*, L. R., 14 Ch. D., 212.

Effect of an order vesting legal right in a thing in action.

XXVI. When any order shall have been made under this Act by the High Court vesting the legal right to sue for or recover any thing in action, or any interest in respect thereof, in any person or persons, such legal right shall vest accordingly; and thereupon it shall be lawful for the person or persons so appointed to carry on, commence, and prosecute, in his or their own name or names, any suit or other proceeding for the recovery of such thing in action in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such thing in action.

Trustee Act, 1850, s. 27.

On neglect to transfer stock, &c., for twenty-eight days, order may be made vesting right to transfer in such person as the Court shall appoint.

XXVII. Where any person shall neglect or refuse to transfer any stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for or recover any thing in action, or any interest in respect thereof, for the space of twenty-eight days next after an order of the High Court for that purpose shall have been served upon him, it shall be lawful for the said Court to make an order (*a*) vesting all the right of such person to transfer such stock or Government securities, or to receive the dividends,

APPDX.

interest, or income thereof, or to sue for or recover such thing in action, or any interest in respect thereof, in such person or persons as the said Court may appoint.

Trustee Extension Act, 1852, s. 4.

(*a*) The order may be made on motion; a petition is not necessary.—*Re Holbrook's Will*, 5 Jur., N. S., 1333.

On like neglect by executor similar order may be made.

XXVIII. When any stock or Government securities shall be standing in the sole name of a deceased person, and his executor or administrator shall refuse or neglect to transfer such stock or Government securities, or receive the dividends, interest, or income thereof for the space of twenty-eight days next after an order of the High Court for that purpose shall have been served upon him, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, in any person or persons whom the said Court may appoint (*a*).

Trustee Extension Act, 1852, s. 5.

(*a*) It is the practice of the Bank of England not to allow the dividend to be split into fractional parts.—*Skynner* v. *Pelichet*, 9 W. R. (Eng.), 191; Lewin, 7th Ed., 895.

Companies and associations to comply with such orders.

XXIX. When any order being, or purporting to be, under this Act shall be made by the High Court, vesting the right to any stock or Government securities, or vesting the right to transfer any stock or Government securities, or vesting the right to call for the transfer of any stock or Government securities in any person or persons, in every such case the legal right to transfer such stock or Government securities shall vest accordingly (*a*); and the person or persons so appointed shall be authorized and empowered to execute all deeds and powers-of-attorney, and to perform all acts relating to the transfer of such stock or Government securities into his or their own name or names, or otherwise to the extent and in conformity with the terms of the order. All companies and associations and all persons shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as such companies, associations, or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made.

Trustee Extension Act, 1852, s. 6.

(*a*) For form of order on appointment of new trustees, where the funds are invested on unauthorized securities, and it is desired not to transfer them into the names of the new trustees, but to sell them and re-invest the funds in accordance with the trusts of the settlement, see *Re Peacock*, L. R., 11 Ch. D., 212.

Where the trustees appointed by a testator died and new trustees were appointed in their place, and all the trust-property was vested in the new trustees, the bank declined to act unless the order directed the new trustees to transfer the stock into their own names.—*Re Glanville's Trusts*, W. N., 1877, p. 248 ; 1878, p. 2.

Power to make an order for the transfer or receipt of dividends of stock, &c., in name of a minor trustee.

XXX. When any minor shall be solely entitled to any stock or Government securities upon any trust, it shall be lawful for the High Court to make an order vesting in any person or persons the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof (*a*). When any minor shall be entitled jointly with any other person or persons to any stock or Government securities upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, either in the person or persons jointly entitled with the minor, or with him or them together, with any other person or persons the said Court may appoint (*b*).

Trustee Extension Act, 1852, s. 3.

(*a*) Agents of executors invested a sum of stock in the names of infants, who had an interest under the will, instead of in the names of the executors, and the Court made a vesting order for the transfer into the names of the executor.—*Rives* v. *Rives*, W. N., 1866, p. 144 ; Lewin, 7th Ed., 894 So, where the executors had invested stock in the names of themselves and an infant, and the infant was the survivor.—*Gardner* v. *Cowles*, L. R., 3 Ch. D., 304.

(*b*) See *Sanders* v. *Homer*, 25 Beav., 467.

Where a decree is made for sale of immoveable property for payment of debts.

XXXI. When a decree or order shall have been made by the High Court directing the sale of any immoveable property for the payment of the debts (*a*) of a deceased person, every person holding such property or entitled to a contingent right therein as heir, or under the will of such deceased debtor, shall be deemed so to hold or be entitled (as the case may be) upon a trust within the meaning of this Act: and the High Court is hereby empowered to make an order wholly discharging the contingent right under the will of such deceased debtor of any unborn person (*b*).

Trustee Act, 1850, s. 29.

(*a*) See s. 32, *post*, and *Wake* v. *Wake*, 17 Jur., 545.

(*b*) An order in a cause may apparently be made without a petition. —*Wood* v. *Beetlestone*, 1 K. and J., 213. In *Gough* v. *Bage*, W. N., 1871, p. 437, however, a petition was presented.

High Court may make an order for vesting the estate in lieu of conveyance by a party to the suit after a decree or order for sale.

XXXII. When any decree or order shall have been made (*a*) by the High Court, whether before or after the passing of this Act, directing the sale of any immoveable property for any purpose whatever (*b*), every person holding such property, or entitled to a contingent

APPDX.

right therein, being a party to the suit or proceeding in which such decree or order shall have been made and bound thereby, or being otherwise bound by such decree or order, shall be deemed so to hold or be entitled (as the case may be) upon a trust within the meaning of this Act. In every such case it shall be lawful for the High Court (*c*), if the said Court shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such property or any part thereof for such estate as the Court shall think fit, either in any purchaser or in such other person as the Court shall direct (*d*). Every such order shall have the same effect as if the person so holding or entitled had been free from disability and had duly executed all proper conveyances and assignments of such property for such estate.

Trustee Extension Act, 1852, s. 1.

(*a*) Where a testatrix devised real estate on trust for sale, but there had never been a trustee of the will, in consequence of the death, during the testatrix's lifetime, of the sole trustee named in the will, and it was not known who was the heir of the testatrix, it was held, that the Court had no jurisdiction under the Trustee Act, 1850, in the absence of the heir, to appoint a trustee and to make an order vesting in him the real estate descended.—*Gunson* v. *Simpson*, L. R., 5 Eq., 332 : see *Gough* v. *Bage*, W. N., 1871, p. 437.

(*b*) *Quære.*—Whether the section applies to the case where the person to convey is not under disability?—Lewin, 7th Ed., 893.

(*c*) Where the estate in land sold under the order of the Court is vested in a person of unsound mind, but not found lunatic, an order may be made appointing a person to convey the estate.—*Herring* v. *Clark*, L. R., 4 Chan., 167.

(*d*) Where property has been, by an order of the Court, directed to be sold, and where some of the parties interested in such property are either out of the jurisdiction, married women, or minors, and the place of abode of others of them is unknown, the Court will, on petition under this Act, appoint a person to convey the interest of such persons to any purchaser, notwithstanding that, at the time the order is applied for, no contract for the sale of the property has been entered into. But the Court cannot make such an order with respect to the interest of a party who has not been served, and who has not entered appearance.—*Lackersteen* v. *Rostan*, I. L. R., 7 Calc., 32.

Court to declare what parties are trustees of immoveable property comprised in any suit and as to the interests of persons unborn.

XXXIII. Where any decree or order shall be made by the High Court for the specific performance of a contract concerning any immoveable property (*a*), or for the partition (*b*), or exchange of any immoveable property (*c*), or generally when a decree shall be made for the conveyance of any immoveable property, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said Court to declare that any of the parties to the said suit wherein such decree is made are trustees of such property, or any part thereof, within the meaning of this Act, or to declare concerning the interests of

unborn persons (*d*) who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of this Act. Thereupon it shall be lawful for the High Court to make such order or orders as to the estates, rights, and interests of such persons, born or unborn, as the said Court might, under the provisions of this Act, make concerning the estates, rights, and interests of trustees, born or unborn.

Trustee Act, 1850, s. 30.

(*a*) Where a donee of a power of jointuring under a settlement was ordered, in a specific performance suit instituted by his wife, to execute the power by a deed to be approved of by the Master, whereby a certain sum was to be appointed as the plaintiff's jointure, and the defendant refused to obey the decree, it was held, that he might be declared a trustee of all the rights, interests, and property acquired by him under the settlement, and the Court appointed a person to execute the requisite deed in his absence.—*Ex parte Mornington*, 4 D. M. G., 537. In a suit for the specific performance of a lease, the Court has no power either to appoint a person to convey in the place of a party refusing to execute the lease or to make a vesting order.—*Grace* v. *Baynton*, W. N., 1877, p. 79.

(*b*) In a partition-suit, instead of giving an infant defendant a day to show cause, the Court may declare him a trustee of such parts of the property as are allotted to the other parties.—*Bowra* v. *Wright*, 4 D. G. and Sm., 265.

Where a decree in a partition-suit had declared a lunatic a trustee of an allotted portion of the land for the plaintiff, it was held, that a vesting order could be made under the Act.—*In re Molyneux*, 4 D. F. J., 365.

(*c*) In a foreclosure decree on an equitable mortgage, the mortgagor was declared a trustee, and an order was made vesting the estate in the mortgagee (*Lechmere* v. *Clamp*, 30 Beav., 218): and in such a suit where the estate of the mortgagor was devised in trust for sale, and had become vested in an infant, who was also one of the persons beneficially interested, it was held, that the decree should contain a direction that, in case the mortgages were not redeemed within six months, the infant should be a trustee for them within the meaning of the Act, and the executrix of the mortgagor be ordered to convey the estate to the mortgagees on his behalf.—*Foster* v. *Parker*, L. R., 8 Ch. D., 147. See further Lewin, 7th Ed., 881.

(*d*) This includes heirs of a person now living.—*Basnett* v. *Moxon*, L. R., 20 Eq., 182.

Power to give directions how the right to transfer stock shall be exercised.

XXXIV. It shall be lawful for the High Court to make declarations and give directions concerning the manner in which the right to any stock, Government securities, or thing in action, vested under the provisions of this Act, shall be exercised, and thereupon the person or persons in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under this Act are enforced (*a*).

Trustee Act, 1850, s. 31.

APPDX.

(*a*) Under this section the Court has no jurisdiction to order the fund into Court (*Re Parley*, 29 L. J., 72: see Lewin, 7th Ed., 882); nor has it jurisdiction to give any direction as to the property of a person not found lunatic by inquisition except in cases where it is being administered by the Court.—*Re Tayler*, 2 D. F. J., 125.

Power to Court to make order appointing new trustees.

XXXV. In all cases in which it shall be expedient (*a*) to appoint (*b*) a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the High Court, it shall be lawful for the said Court to make an order appointing a new trustee or new trustees, whether there be any existing trustee or trustees or not at the time of making such order (*c*), and if there be such trustee or trustees, either in substitution for or in addition to him or them. The person or persons who, upon the making of such order, shall be trustee or trustees, shall have the same rights and powers as he or they would have had if appointed by decree in a suit duly instituted (*d*).

New trustees to have powers of trustees appointed by decree in suit.

Trustee Act, 1850, ss. 32 and 33, and Trustee Extension Act, 1852, s. 9.

(*a*) It is 'expedient' to appoint a new trustee where the trustee appointed is an infant.—*Re Porter's Trust*, 2 Jur., N. S., 349; *Re Gartside's Estate*, 1 W. R. (Eng.), 196. In such a case the appointment should be without prejudice to any application by the infant to be restored to the trusteeship on coming of age.—*Re Shelmerdine*, 33 L. J., Chan., 474. So it is 'expedient' to appoint a new trustee when there is no representative of a surviving trustee (*Re Matthews*, 26 Beav., 463; *Re Davis's Trusts*, L R., 12 Eq, 214), or there would be difficulties in obtaining a representative.—*Davis* v. *Chanter*, 4 Jur., N S, 272. Where two trustees were desirous of retiring, and it was doubtful whether the power of appointing new trustees in the settlement applied to the case, it was deemed 'expedient' to appoint new trustees.—Lewin, 7th Ed., 882, citing *Re Woodgate's Settlement*, 5 W. R., *Re Armstrong's Settlement*, *ibid.* So, a new trustee has been appointed in the place of a trustee who had become bankrupt, had never surrendered, and had not been heard of for several years.—*Re Renshaw's Trusts*, L. R., 4 Chan., 783; and see *Coombes* v. *Brookes*, L. R., 12 Eq., 61. The Court may appoint trustees where there never have been any trustees, or where they have all died in the testator's lifetime.—*Re Smirthwaite's Trusts*, L. R, 11 Eq., 251.

(*b*) The Court has no jurisdiction under this Act to appoint new trustees where there are trustees *de facto* acting as such (*Ex parte Hadley*, 5 DeG. and Sm., 67); nor has it jurisdiction to take away the power of appointing new trustees from the donee of the power, where the donee is capable of exercising and willing to exercise it, although such donee may have disclosed an intention or desire to exercise his power corruptly. —*Re Hodson's Settlement*, 9 Hare, 118.

Where one of two trustees was residing out of the jurisdiction, but it did not appear whether such residence was likely to be permanent, the Court refused to appoint a new trustee in his room.—Lewin, 7th Ed., 882, citing *Re Mair*, 19 Jur., 608. See *Re The Lincoln Primitive Methodist's Chapel*, 1 Jur., N. S., 1011.

The Act was not intended to extend to the displacing of trustees desirous to continue in the trust, and to the appointing of others in their

place; and especially not to the displacing of trustees and the appointing of others, on the ground of alleged misconduct in the trustees to be displaced. The section was meant to apply to cases in which there might be a question about the expediency of what was sought to be done. It was not intended to alter the right of every trustee to have his account taken in Court in the presence of all the parties interested under the trust, so that all might be bound, and to have any balance which might be found due to him on the result of the account paid, or secured to him before he was denuded of the trust-estate.—*Re Blanchard*, 7 Jur., N. S., 505; 3 D. F. and J., 131.

Where a trustee had gone abroad and his whereabouts was not known, a new trustee was appointed.—*Re Harrison's Trust*, 22 L. J, N. S, Chan., 69. See *Re Joyce's Estate*, L. R., 2 Eq., 576; *Re Bignold's Trusts*, L. R., 7 Chan., 223.

So, new trustees were appointed where the trustees had disclaimed, and the parties in whom the power of appointment was vested were in India.—*Re Humphry's Estate*, 1 Jur., N. S., 921.

When the person having power to appoint a new trustee is a lunatic, the Court has power to appoint a new trustee under the Act.—*Re Sparrow*, L. R., 5 Chan., 662.

Where new trustees have been appointed by the donees of a power, the Court will formally re-appoint them for the purpose of making a vesting order.—*Re Pearson*, L. R, 5 Ch. Div., 982. An affidavit of fitness will be required —*Re Maynard's Settlement Trusts*, 16 Jur., 1084.

Where all the *cestuis que trustent* are resident out of the jurisdiction, the Court will appoint new trustees resident out of the jurisdiction.—*Re Liddiard*, L R., 14 Ch Div., 310.

As to appointing new trustees in the place of a lunatic trustee, see Lewin, 7th Ed., 883.

(*c*) These words are taken from the Trustee Extension Act, 1852, s. 9.

(*d*) The Court will appoint two trustees in the place of one, as trust-property should be prevented from coming into the hands of a sole trustee *Re Tunstall's Will*, 4 DeG. and Sm., 421, and it has added two new trustees to two original trustees.—Lewin, 7th Ed., 884, citing *Re Baycott*, 5 W. R., (Eng.) 15. But it will not appoint one trustee in the place of two or more *Re Dickinson's Trusts*, 1 Jur, N. S., 724; *Re Ellison's Trust*, 2 Jur., N. S., 62; *Re Porter's Trust*, *ibid*, 348, unless the trust is to be shortly wound up.—*Re Reynault*, 16 Jur., 233. Two trustees may be appointed in the place of three *Bulkeley* v. *Earl of Eglinton*, 1 Jur., N. S., 994; or three in the place of four.—*Emmet* v. *Clarke*, 7 Jur., N. S, 404.

Where a legacy had been bequeathed to a sole trustee upon trust for a tenant-for-life, and then for reversioners absolutely, the Court appointed an additional trustee, and ordered the costs of a petition, presented for that purpose by the reversioners, to be paid by them, and not out of the *corpus*.—*Re Brackenbury's Trusts*, L. R., 10 Eq., 45.

When a trustee wishes to retire and a successor cannot be found, the Court can appoint the continuing trustees to be sole trustees in the place of the continuing and retiring trustee.—*Re Stokes's Trusts*, L. R., 13 Eq., 333; *Re Harford's Trusts*, L. R., 13 Ch. Div., 135.

In the case of a charity, the Court appointed ten new trustees and vested the estate in the whole body, and directed that when reduced to three, the trustees should apply at Chambers for the appointment of new trustees.—Lewin, 7th Ed., 884, citing *Re Bergholt*, 2 Eq. Rep., 90.

The Court will not, if it can be avoided, appoint a *cestui que trust* to be a trustee.—*Ex parte Clutton*, 17 Jur., 988. As to appointing the husband of a *cestui que trust*, see Lewin, 7th Ed., 884. Nor will the Court appoint an alien resident out of the jurisdiction a trustee, unless it is necessary from the circumstances of the case to do so.—*Re Hill's Trust*, W. N., 1874, p. 228.

APPDX.

If a *cestui que trust* institutes a suit for the appointment of a new trustee, when a petition would have been sufficient, he will have to bear the additional costs.—*Legg* v. *Mackrell*, 1 Giff., 165; *Thomas* v. *Walker*, 18 Beav., 521.

Where there are two distinct trust-estates under the same will, but only one set of trustees, the Court, with the consent of the representative of the surviving trustee, will appoint new trustees of one estate without dealing with the other estate *Re Dennis*, 12 W. R., (Eng.) 575; and generally the Court assumes the power of appointing separate trustees of separate shares.—*Re Cotterill's Trusts*, W. N., 1869, p. 183. See Lewin, 7th Ed., 884.

The petition for appointment of new trustees must be supported by affidavits of the facts stated. and of the fitness of the proposed trustees, who must give their written consent to the appointment.—*In Re Battersby's Trust*, 16 Jur., 900. Sometimes a reference as to the fitness of the trustees is directed; but it is not necessary if the evidence adduced is sufficient.—*Re Tunstall*, 15 Jur., 645. An affidavit of fitness by the solicitor in a suit is not sufficient.—*Greendy* v. *Buckridge*, 22 L. J., Chan., 1007.

The new trustee need not appear upon the petition to consent *Re Draper's Settlement*, 2 W. R. (Eng.), 440; though they may appear to consent.—*Re Parke's Trust*, 21 L. J., 218. If they do not appear, an affidavit that the proposed new trustees will consent is insufficient *Re Parke's Trust*. 21 L. J., 218, and their written consent must be proved.—Lewin, 7th Ed., 885.

Power to Court to vest immoveable property in new trustee.

XXXVI. It shall be lawful (*a*) for the High Court, upon making any order (*b*) for appointing a new trustee or new trustees, either by the same or any subsequent order (*c*), to direct that any immoveable property, subject to the trust (*d*), shall vest in the person or persons who, upon the appointment, shall be the trustee or trustees for such estate as the Court shall direct. Such order shall have the same effect as if the person or persons who, before such order, was or were the trustee or trustees (if any) had duly executed all proper conveyances of such property for such estate (*e*).

Trustee Act, 1850, s. 34.

(*a*) The Court has authority to make a vesting order, although there may be a person capable of executing a conveyance.—*Re Manning's Trusts*, Kay, xxviii.

(*b*) Where an order is made under the Act, subject to the production of evidence to the Registrar, the order will bear date on or after the day of the production of the evidence. Where a party directed to transfer died between the making and the date of the order, the Court made a supplemental order to meet the difficulty, without requiring a further petition.—*Re Havelock's Trust*, 11 Jur., N. S., 906.

(*c*) The Court has jurisdiction to make a vesting order of the legal estate in mortgaged lands when a transfer of the mortgage has been ordered by the Court, and it is doubtful whether the trustees of the debt have power to convey the legal estate.—*Re Hughes's Settlement Trusts*, 2 H. and M., 695. A vesting order may be made after the appointment of trustees in a suit.—*Ibid.*

(*d*) Where a sole trustee of leaseholds had died intestate, and had no legal personal representative, and new trustees had been duly

appointed under the settlement, the Court re-appointed the same two persons trustees and made an order vesting the leaseholds in them.—*Re Dalgleish's Settlement*, L. R., 4 Ch. D., 143; see further Lewin, 7th Ed., 385.

(*c*) In a suit to appoint new trustees, it appeared that of two remaining trustees one had gone out of the jurisdiction, and the other was willing to act,—it was held, that a vesting order could be made to vest the estate in the new trustees to be appointed for such estate as was vested in the continuing and absent trustee.—*Smith* v. *Smith*, 3 Drew, 72.

Power to Court to vest right to call for transfer of stock, or to sue, in new trustee.

XXXVII. It shall be lawful for the High Court, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to vest the right to call for a transfer of any stock (*a*) or Government securities subject to the trust, or to receive the dividends, interest, or income thereof, or to sue for or recover any thing in action subject to the trust, or any interest in respect thereof, in the person or persons who upon the appointment shall be the trustee or trustees (*b*).

Trustee Act, 1850, s. 35.

(*a*) Under this section the Court cannot vest the right to the stock in the new trustees.—*Re Smyth's Settlement*, 4 DeG. and Sm., 499; see s. 29, *ante*, p. 430. The Court has power under this section to vest the right as to stock standing in the name of a deceased person who has no personal representative.—*Re Herbert's Will*, 8 W. R. (Eng.), 272, cited Lewin, 7th Ed., 886.

(*a*) Where a breach of trust has been committed, the Court, though it sanctions the appointment of a new trustee, will make no order respecting the property, lest by so doing it should sanction the breach of trust.—*Re Harrison's Trust*, 22 L. J., Chan., 69.

(*b*) The effect of a vesting order is to vest the estate at once from its date in the new trustees without any further formality.—*Woodfall* v. *Arbuthnot*, L. R., 3 P. and D., 109.

Old trustees not to be discharged from liability.

XXXVIII. Any such appointment by the High Court of new trustees, and any such conveyance or transfer as aforesaid, shall operate no further or otherwise than as a discharge to any former or continuing trustee, than an appointment of new trustees under any power for that purpose contained in any instrument would have done.

Trustee Act, 1850, s. 36.

Who may apply under Act.

XXXIX. An order under any of the hereinbefore contained provisions, for the appointment of a new trustee or new trustees, or concerning any immoveable property, stock, or Government securities, or thing in action subject to a trust, may be made upon the application of any person beneficially interested in such immoveable property, stock, Government securities, or thing in action, whether under disability or not (*a*), or upon the application of any person duly appointed as a

APPDX. trustee thereof; and an order under any of the provisions hereinbefore contained concerning any immoveable property, stock, Government securities, or thing in action subject to a mortgage, may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the moneys secured by such mortgage.

Trustee Act, 1850, s. 37.

(*a*) A person who has a contingent interest in a trust-fund has a *locus standi* to present a petition for the appointment of new trustees.—*Re Sheppard's Will*, 4 D. F. and J., 423.

The purchaser of property sold under an order of Court is 'beneficially interested,' and is the proper person to apply for a vesting order.—*Ayles* v. *Cox*, 17 Beav., 584. He may join with the plaintiffs in presenting the petition.—*Rowley* v. *Adams*, 14 Beav., 130. Creditors who have obtained a decree for the administration of the estate of their deceased debtor, under which a contract for the sale of his real estate has been entered into and the purchase-money paid into Court, are 'beneficially interested' in the lands comprised in the contract, and are entitled to apply for a vesting order (*Re Wragg*, 1 DeG. J. and S, 356); but the committee of the lunatic is not.—*Re Bourke*, 2 DeG. J. and S., 426.

Application may be by petition.

XL. When any person shall deem himself entitled to an order under any of the provisions hereinbefore contained, it shall be lawful for him to present a petition (*a*) to the High Court for such order as he may deem himself entitled to, and he may give evidence by affidavit, or otherwise (*b*), in support of such petition before the said Court, and may serve such person or persons with notice of such petition as he may deem entitled to service thereof (*c*).

Trustee Act, 1850, s. 40.

(*a*) When a petition has been presented, it may be amended by an order of the Court by adding co-petitioners without being re-answered.—*Re Cartwright's Trust*, 8 W. R., (Eng.), 492, cited Lewin, 7th Ed., 887.

(*b*) In practice, the evidence adduced is universally by affidavit; but under the words 'or otherwise' the applicant is not confined to evidence by affidavit.—Lewin, 7th Ed., 887.

(*c*) All the *cestuis que trustent* ought, as a general rule, to be served. See the cases cited, Lewin, 7th Ed., 887; but the Act does not in terms so require, and it is not unusual to dispense with service on all parties.—*Re Blanchard*, 3 D. F. and J., 137; and see *Battersby's Trusts*, L. R., 10 Ch. D., 228.

The persons constituting different classes of *cestuis que trustent* may be proved by affidavit without strict evidence of certificates and affidavits of identity.—*Re Hoskins*, 4 DeG. and J., 436.

On a petition to appoint new trustees in the place of trustees desirous of retiring, the *cestuis que trustent* and the old trustees must appear (*Re Sloper*, 18 Beav., 596), and they will have their costs.—*Futvoye* v. *Kennard*, 3 L. T., N. S., 687.

It is not, however, necessary to serve the petition on recusant trustees.—*Re Baxter*, 2 Sm. and G., Appx. v.

A petition for an order vesting in a new trustee property, of which a trustee has become lunatic, ought to be served on his committee as the

trustee may have claims.—*Re Saumarez*, 8 D. M. G., 320; but see *Re Green*. L. R., 10 Chan., 272.

Service of a petition vesting in newly-appointed trustees lands which had descended to the infant heir of the former sole trustee upon the guardian of the infant heir is not necessary (*Re Little*, L. R., 7 Eq., 323); but the adult heir of a surviving trustee must be served, for he may have some claim to costs.—Lewin, 7th Ed., 1887.

The Court has jurisdiction to order service of the petition upon a person out of jurisdiction.—*Ibid.*

What may be done upon petition.

XLI. Upon the hearing of any such petition, it shall be lawful for the said High Court, should it be deemed necessary, to direct a reference to one of the Judges of the Court to inquire into any facts which require such an investigation, or it shall be lawful for the said Court to direct such petition to stand over, to enable the petitioner to adduce evidence or further evidence before the Court, or to enable notice, or any further notice of such petition to be served upon any person or persons.

Trustee Act, 1850, s. 41.

Court may dismiss petition with or without costs.

XLII. Upon the hearing of any such petition, it shall be lawful for the High Court to dismiss such petition with or without costs, or to make an order thereupon in conformity with the provisions of this Act.

Trustee Act, 1850, s. 42.

Power to make an order in a cause.

XLIII Whensoever in any cause or matter, either by the evidence adduced therein, or by the admission of the parties, or by report of one of the Judges of the Court, the facts necessary for an order under this Act shall appear to the High Court to be sufficiently proved, it shall be lawful for the said Court, either upon the hearing of the said cause or of any petition or application in the said cause or matter, to make such order under this Act (*a*).

Trustee Act, 1850, s. 43.

(*a*) An order may be made in a suit without a petition. See the cases collected, Lewin, 7th Ed., 888.

As to whether the order should not be made in Court and not in Chambers, see *Frodsham* v. *Frodsham*, L. R., 15 Ch. D., 317.

The Court has no jurisdiction to make a vesting order respecting property which is vested in a lunatic, but there must be a petition in lunacy.—Lewin, 7th Ed., 888, citing *Jeffreys* v. *Drysdale*, 9 W. R., 428.

Order made by the High Court founded on certain allegations to be conclusive evidence of the matter contained in such allegations.

XLIV. Whenever any order shall be made under this Act by the High Court for the purpose of conveying any immoveable property, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or an

APPDX. allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction of the High Court or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir, or last surviving devisee of a mortgagee be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then, in any of such cases, the fact that the High Court has made an order upon such an allegation shall be conclusive evidence of the matter so alleged in any Court of civil judicature upon any question as to the legal validity of the order: Provided always, that nothing herein contained shall prevent the High Court directing a reconveyance of any immoveable property conveyed or assigned by any order under this Act, or a re-disposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said Court to direct any of the parties to any suit concerning such property or contingent right to pay any costs occasioned by the order under this Act when the same shall appear to have been improperly obtained..

Trustee Act, 1850, s. 44.

Trustee of charity.

XLV. It shall be lawful for the High Court to exercise the powers herein conferred for the purpose of vesting any immoveable property, stock, Government securities, or thing in action in the trustee or trustees of any charity or society over which charity or society the High Court would have jurisdiction upon suit duly instituted (*a*), whether such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court, or by order made upon a petition to the said Court.

Trustee Act, 1850, s. 45. See further, *ante*, pp. 366-367.
(*a*) See Seton on Decrees, 4th Ed., 565.

Money of minors and persons of unsound mind to be paid into Court.

XLVI. Where any minor or person of unsound mind shall be entitled to any money payable in discharge of any immoveable property, stock, Government securities, or thing in action conveyed or transferred under this Act, it shall be lawful for the person by whom such money is payable to pay the same into the High Court, in trust in any cause then depending concerning such money, or if there shall be no such cause, to the credit of such minor or person of unsound mind, subject to the order or disposition of the said Court; and it shall be lawful for the said Court upon petition in a summary way to order any money so paid to be invested in Govern-

ment securities and to order payment or distribution thereof, or payment of the dividends or interest thereof as to the said Court shall seem reasonable.

Trustee Act, 1850, s. 48.

Court may make decree in absence of a trustee.

XLVII. When in any suit commenced, or to be commenced, in the High Court, it shall be made to appear to the Court that diligent search and enquiry have been made after any person made a defendant, who is only a trustee, to serve him with the process of the Court, and that he cannot be found, it shall be lawful for the said Court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to it to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the Court and had appeared at the hearing of such cause: Provided always, that no such decree shall bind, affect, or in anywise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors, or administrators for or in respect of any estate, right, or interest which such person shall have at the time of making such decree for his own use or benefit, or otherwise than as a trustee as aforesaid (*a*).

Trustee Act, 1850, s. 49.

(*a*) In *Westhead* v. *Sale*, 6 W R. (Eng.), 52, cited Lewin, 7th Ed., 890, the Court directed the record and writ clerk to certify that the cause was ready for hearing in the absence of a trustee who could not be found.

Orders made under this Act to be chargeable with the same stamp-duty as deeds of conveyance.

XLVIII. Every order to be made under this Act which shall have the effect of a conveyance of any immoveable property or a transfer of any such stock, Government securities, or thing in action as can only be transferred by stamped deed, or for the transfer of which a stamp is necessary, shall be chargeable with the like amount of stamp-duty as it would have been chargeable with if it had been a deed executed, or a transfer made (*a*), by the person or persons holding such property or entitled to such stock, Government securities, or thing in action. Every such order shall be duly stamped for denoting the payment of the said duty.

Trustee Extension Act, 1852, s. 13.

(*a*) See Act I of 1879 (The General Stamp Act), sched. i, arts., 21, 60.

Costs may be paid out of the estate.

XLIX. The High Court may order the costs and expenses of, and relating to, the petitions, orders, directions, conveyances, and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the immoveable or

APPDX. moveable property, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Court shall think proper (*a*).

Trustee Act, 1850, s. 51.

(*a*) The petition should not pray for costs "incidental to, or subsequent on," the application, as they give rise to uncertainty.—*Re Fellow's Settlement*, 2 Jur., N. S., 62.

The costs of appointing new trustees are paid out of the trust-fund.—*Re Fulham*, 15 Jur., 69; *Ex parte Davies*, 16 Jur., 882; *Re Fellow's Settlement*, 2 Jur., N. S., 62.

On an application for appointment of new trustees of two funds, the costs will be paid out of the funds ratably.—*Re Grant's Trusts*, 2 J. and H., 764.

In *Ex parte Davies*, 16 Jur., 882, a new trustee was appointed in the place of a sole trustee, deceased. The heir of the deceased trustee could not be found, and, on petition, an order was made to vest the estate in the new trustee, or that upon consent he might pay the costs of the proceedings, and that such costs, with interest at 4 per cent., might form a charge on the inheritance. The Court, on appointing new trustees of real estate, has power under the section to direct the costs to be raised by a mortgage to be settled by the Court.—*Re Crabtree*, V. C. WOOD, 11th Jan., 1866; see Lewin, 7th Ed., 891. Where an order is made for vesting estate in property sold in lots under the order of the Court, the costs will be paid by the vendors out of the purchase-money of each lot and not out of the fund in Court generally.—*Ayles* v. *Cox*, 17 Beav., 584.

The Court has no jurisdiction to award costs adversely against third parties cited to appear as respondents upon a petition to appoint new trustees.—*Re Primrose*, 23 Beav., 590.

Enquiry concerning person of unsound mind.

L. Upon any petition being presented under this Act to the High Court concerning a person of unsound mind, it shall be lawful for the said Court to make an order directing an enquiry whether such person is or is not of unsound mind, and incapable of managing himself and his affairs. Such order shall have the same effect as the like order made under section 1 of Act XXXIV of 1858 (*to regulate proceedings in Lunacy in the Courts of Judicature established by Royal Charter*), and the enquiry directed to be made shall be made in all respects in the manner declared and prescribed for making an enquiry under the last-mentioned Act. The High Court may postpone making any order upon the petition presented as aforesaid, until any enquiry so directed to be made shall have been finally concluded.

Trustee Act, 1850, s. 52.

Suit may be directed.

LI. Upon any petition under this Act being presented to the High Court, it shall be lawful for the said Court to postpone making any order upon such petition, until the right of the petitioner shall have been declared in a suit duly instituted for that purpose (*a*).

Trustee Act, 1850, s. 53.

(*a*) See *Re Collinson*, 3 D. M. G., 409; *Re Burt*, 9 Hare, 289.

LII. Every order made, or purporting to be made, under this Act by the High Court shall be a complete indemnity to all persons whatsoever for any act done pursuant thereto; and it shall not be necessary for such persons to enquire concerning the propriety of such order, or whether the High Court has jurisdiction to make the same.

Indemnity to all persons obeying orders passed under this Act.

Trustee Extension Act, 1852, s. 7.

Orders under the Act to be executed as, and have the effect of, decrees.

LIII. Any order made by the High Court under this Act shall have the same effect, and be executed in the same manner, as a decree.

Short title.

LIV. This Act may be cited as "The Indian Trustee Act, 1866."

THE TRUSTEES' AND MORTGAGEES' POWERS ACT, 1866.

ACT XXVIII OF 1866.

(*Received the assent of the Governor-General in Council on the 24th October*, 1866.)

An Act to give Trustees, Mortgagees, and others, in cases to which English law is applicable, certain powers now commonly inserted in settlements, mortgages, and wills, and to amend the law of Property and relieve Trustees (*a*).

(*a*) This Act applies to the whole of British India, except the Scheduled Districts—Act XV of 1874. Sections 2, 3, 4, 5, 32, 33, 34, 35, 36, and 37 have been repealed in Madras, the North-West Provinces, and the Panjab, and in the territories administered by the Chief Commissioners of Oudh, the Central Provinces, Coorg, and Assam, by Act II of 1882. The Act is founded on the English Statutes 22 & 23 Vict., c. 35 (The Trustees Relief Amendment Act) and 23 & 24 Vict., c. 145 (The Trustees' and Mortgagees' Act).

Preamble.

WHEREAS it is expedient that, in cases to which English law is applicable (*a*), certain powers and provisions usually inserted in settlements, mortgages, wills, and other instruments should be made incident to the estates of the persons interested, so as to dispense with the necessity of inserting the same in terms in every such instrument, and that in such cases trustees should be relieved; It is enacted as follows:—

Interpretation of terms.

I. In the construction of this Act, unless there be something repugnant in the subject or context—

APPDX.

'Immoveable property.'

'Immoveable property' shall include land, any benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth:

'Mortgage.'

'Mortgage' shall be taken to include every instrument by virtue whereof immoveable property is in any manner conveyed, pledged, or charged as security for the repayment of money or money's worth lent, and to be reconveyed or released on satisfaction of the debt:

'Mortgagor.'

'Mortgagor' shall be taken to include every person by whom any such conveyance, pledge, or charge as aforesaid shall be made:

'Mortgagee.'

'Mortgagee' shall be taken to include every person to whom or in whose favour any such conveyance, pledge, or charge as aforesaid is made or transferred; and

'High Court.'

'High Court' means any Court established, or to be established under Statute 24 and 25 Vict., c. 104, and includes the Chief Court of the Punjab, and the Supreme Court of Judicature of the Settlements of Prince of Wales's Island, Singapore, and Malacca.

(*a*) See as to the meaning of these words, *ante*, p. 15.

Trustees empowered to sell may sell in lots, and either by public auction or private contract.

II. In all cases where, by any will, deed, or other instrument of settlement, it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale (*a*), either generally or in any particular event, over any immoveable property named or referred to in, or from time to time subject to, the uses or trusts of such will, deed, or other instrument, it shall be lawful for such trustees or other persons, whether such property be vested in them or not, to exercise such power of sale by selling such property either together or in lots, and either by public auction or private contract, and either at one time or at several times.

23 & 24 Vict., c. 145, s. 1. See further, *ante*, p. 223. Partially repealed, see *ante*, p. 443.

(*a*) These sections of the Act strictly apply to those cases only where there is a power of sale; but it is probable that a trust for sale would be within the Act.—3 Dav. Convey., 565 n (*u*).

Sale may be made under special conditions and trustees may buy in.

III. It shall be lawful for the persons making any such sale to insert any such special or other stipulations, either as to title or evidence of title, or otherwise, in any conditions of sale, or contract for sale, as they shall think fit; and also to buy in the property or any part thereof at any sale by auction, and to rescind or vary any contract for sale, and to re-sell

the property which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby; and no purchaser under any such sale shall be bound to enquire whether the persons making the same may or may not have in contemplation any particular re-investment of the purchase-money in the purchase of any other property or otherwise.

23 & 24 Vict., c. 145, s. 2, *ante*, p. 225. Partially repealed, see *ante*, p. 443.

Trustees exercising power of sale empowered to convey.

IV. For the purpose of completing any such sale as aforesaid, the persons empowered to sell as aforesaid shall have full power to convey or otherwise dispose of the property in question in such manner as may be necessary.

23 & 24 Vict., c. 145, s. 3, *ante*, p. 225. Partially repealed, see *ante*, p. 443.

Money arising from sales to be laid out in the manner indicated in the will, &c., and until then to be invested in Government securities.

V. The money so received upon any such sale as aforesaid shall be laid out in the manner indicated in that behalf in the will, deed, or instrument containing the power of sale; and until the money to be received upon any sale as aforesaid shall be so disposed of, the same shall be invested at interest in Government securities for the benefit of such persons as would be entitled to the benefit of the money, and the interest and profits thereof in case such money were then actually laid out as aforesaid: Provided that, if the will, deed, or instrument shall contain no such indication, the persons empowered to sell as aforesaid shall invest the money so received upon any such sale in their names upon Government securities in India, and the interest of such securities shall be paid and applied to such person or persons for such purposes and in such manner as the rents and profits of the property sold as aforesaid would have been payable or applicable in case such sale had not been made.

23 & 24 Vict., c. 145, ss. 4, 7, *ante*, p. 164. Partially repealed, see *ante*, p. 443.

Powers incident to mortgages.

VI. Where any principal money is secured or charged by deed on any immoveable property, or on any interest therein, the person to whom such money shall for the time being be payable, his executors, administrators, and assigns, shall, at any time after the expiration of one year from the time when such principal money shall have become payable, according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium or any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the

APPDX. charge, have the following powers to the same extent (but no more) as if they had been in terms conferred by the person creating the charge, namely:—

1st.—A power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property from time to time in like manner.

2nd.—A power to appoint, or obtain the appointment of, a receiver of the rents and profits of the whole or any part of the property in manner hereinafter mentioned.

23 & 24 Vict., c. 145, s. 11.

Receipt for purchase-money sufficient discharges.

VII. Receipts for purchase-money given by the person or persons exercising the power of sale hereby conferred shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase-money.

23 & 24 Vict., c. 145, s. 12.

Notice is to be given before sale; but purchaser relieved from inquiry as to circumstances of sale.

VIII. No such sale as last aforesaid shall be made, until after six months' notice in writing given to the person, or one of the persons, entitled to the property subject to the charge, or affixed on some conspicuous part of such property, but when a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that no such notice as aforesaid had been given; but any person damnified by any such unauthorized exercise of such power, shall have his remedy in damages against the person or persons selling.

23 & 24 Vict., c. 145, s. 13.

Application of purchase-money.

IX. The money arising by any sale effected as aforesaid shall be applied by the person receiving the same as follows:—First, in payment of all the expenses incident to the sale or incurred in any attempted sale; secondly, in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made; and thirdly, in discharge of all the principal moneys then due in respect of such charge; and the residue of such money shall be paid to the person entitled to the property subject to the charge, his executors, administrators or assigns, as the case may be.

23 & 24 Vict., c. 145, s. 14.

Conveyance to the purchaser.

X. The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to, and vest in the purchaser, the property sold, for all the estate and interest therein which the person who created the charge had power to dispose of: Provided that nothing herein contained shall be construed to authorize the mortgagee of a term of years to sell and convey the fee-simple of the property comprised therein in cases where the mortgagor could have disposed of such fee-simple at the date of the mortgage.

23 & 24 Vict., c. 145, s. 15.

Where leaseholds are mortgaged by demise, the mortgagee can, under this section, convey the reversion left in the mortgagor to a purchaser. —*Hiatt* v. *Hillman*, 19 W. R. (Eng.), 694; Shelf. R. P. Stat., 8th Ed., 736.

Owner of charge may call for title-deeds and conveyance of legal estate.

XI. At any time after the power of sale hereby conferred shall have become exercisable, the person entitled to exercise the same shall be entitled to demand and recover from the person entitled to the property, subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed or surrendered to and then were vested in him for all the estate and interest which the person creating the charge had power to dispose of; and where the legal estate shall be outstanding in a trustee, the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made.

23 & 24 Vict., c. 145, s. 16.

Appointment of receiver.

XII. Any person entitled to appoint, or obtain the appointment of, a receiver as aforesaid, may, from time to time, if any person or persons has or have been named in the deed of charge for that purpose, appoint such person, or any one of such persons, to be receiver, or if no person be so named, then may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require such last-mentioned person or persons to appoint a fit and proper person as receiver, and if no such appointment be made within ten days after such requisition, then may in writing appoint any person he may think fit. No person shall be ineligible for the office of receiver merely because he is an officer of the High Court.

23 & 24 Vict., c. 145, s. 17.

APPDX.

A receiver who has been appointed under the ordinary power for that purpose in a deed of mortgage drawn according to the English forms (*Jeffreys* v. *Dickson*, L. R., 1 Chan., 190), or under this Act, is in possession as the agent of the mortgagor. See s. 13, *post*.

Receiver deemed to be the agent of the mortgagor.

XIII. Every receiver appointed as aforesaid shall be deemed to be the agent of the person entitled to the property subject to the charge, who shall be solely responsible for his acts or defaults, unless otherwise provided for in the charge.

23 & 24 Vict., c. 145, s. 18.

Powers of receiver.

XIV. Every receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the rents, issues, and profits of the property of which he is appointed receiver, by suit, distress or otherwise, in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of.

23 & 24 Vict., c. 145, s. 19.

Receiver may be removed.

XV. Every receiver appointed as aforesaid may be removed by the like authority, or on the like requisition as before provided with respect to the original appointment of a receiver, and new receivers may be appointed from time to time.

23 & 24 Vict., c. 145, s. 20.

Receiver to receive commission not exceeding five per cent.

XVI. Every receiver appointed as aforesaid shall be entitled to retain out of any money received by him, in lieu of all costs, charges, and expenses whatsover, such a commission not exceeding five *per centum* on the gross amount of all money received as shall be specified in his appointment, and if no amount shall be so specified, then five *per centum* on such gross amount.

23 & 24 Vict., c. 145, s. 21.

Receiver to insure if required.

XVII. Every receiver appointed as aforesaid shall, if so directed in writing by the person entitled to the money secured by the charge, insure and keep insured from loss or damage by fire, out of the money received by him, the whole or any part of the property included in the charge which is in its nature insurable.

23 & 24 Vict., c. 145, s. 22.

XVIII. Every receiver appointed as aforesaid shall pay and apply all the money received by him in the first place in discharge of Government revenue and of all taxes, rates, and assessments whatsoever, and in payment of his commission as aforesaid, and of the premiums on the insurances if any; and in the next place in payment of all the interest accruing due in respect of any principal money then charged on the property over which he is receiver, or on any part thereof; and subject as aforesaid shall pay all the residue of such money to the person for the time being entitled to the property subject to the charge, his executors, administrators, or assigns.

Application of money received by him.

23 & 24 Vict., c. 145, s. 23.

XIX. The powers and provisions contained in ss. 6 to 18 of this Act, both inclusive, relate only to mortgages or charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt.

This part to relate to charges by way of mortgage only.

23 & 24 Vict., c. 145, s. 24.

XX. Where any license to do any act, which without such license would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease heretofore granted, or to be hereinafter granted, shall, at any time after this Act comes into operation, be given to any lessee or his assigns, every such license shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, underlease, or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such license); and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and shall be available as against any subsequent breach of covenant or condition, assignment, underlease, or other matter not specifically authorized or made dispunishable by such license, in the same manner as if no such license had been given; and the condition or right of re-entry shall be and remain in all respects as if such license had not been given, except in respect of the particular matter authorized to be done.

Effect of restriction on license to alien.

22 & 23 Vict., c. 35, s. 1.

A covenant not to assign or underlet without the license of the lessor is a fair and usual covenant (*Morgan* v. *Slaughter*, 1 Esp., 8; *Folkingham* v. *Croft*, 3 Anst., 700); but it is not a "common and usual" one.—*Henderson* v. *Hay*, 3 Bro. C. C., 632; *Church* v. *Brown*. 15 Ves., 258; *Browne* v. *Raban*, *ibid*, 528; *Buckland* v. *Papillon*, L. R., 2 Ch., 67. Such a covenant runs with the land (*Williams* v. *Earle*, L. R., 3 Q. B., 739; *West* v.

APPDX.

Dobb, L. R., 4 Q B., 634; 5 Q B., 460); but not with the equitable title of a *cestui que trust.*—*West* v. *Dobb*, L R, 4 Q. B, 634; 5 Q. B., 460.

As a general rule, a Court of Equity will not relieve against a forfeiture for alienation without license.—*Hill* v. *Barclay*, 18 Ves., 56. If, however, when a written license is necessary the lessor gives a parol license in order to ensnare his lessee, the Court will relieve on the ground of fraud.—*Richardson* v. *Evans*, 3 Mad, 218. See further, Woodf., L. & T. 10th Edn, 548.

Restricted operation of partial licenses.

XXI. Where in any lease heretofore granted, or to be hereafter granted, there is or shall be a power or condition of re-entry on assigning or underletting, or doing any other specified act without license, and a license, at any time after the passing of this Act, shall be given to one of several lessees or co-owners to assign or underlet his share or interest, or to do any other act prohibited to be done without license; or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such license shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners, of the other shares or interests in the property, or by the lessee or owner of the rest of the property, as the case may be, over or in respect of such shares or interests or remaining property; but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such license.

22 & 23 Vict., c. 35, s. 2.

Apportionment of conditions of re-entry in certain cases.

XXII. Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for nonpayment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him.

22 & 23 Vict., c. 35, s. 3.

See Woodf., L. and T., 10th Ed., 550; Shelf., R. P., 8th Ed., 710.

Rent-Charges.

Release of part of land charged, not to be an extinguishment.

XXIII. The release from a rent-charge of part of the immoveable property charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the property released, without prejudice, nevertheless, to the rights

of all persons interested in the property remaining unreleased, and not concurring in or confirming the release.

22 & 23 Vict., c. 35, s. 10.

"A person having a rent-charge, by releasing all his right in part of the land extinguishes the whole rent, because it issues out of every part, and cannot be apportioned. But a person having a rent-charge may release part of it to the tenant of the land, and reserve part, for the grantee deals only with that which is his own,—namely, the rent, and not with the land. So, if the lessee surrender part of the land to the lessor, the rent services will be apportioned.

"If a man having a rent-charge issuing out of lands, purchases any part of them, the rent-charge is extinct in the whole, because the rent is entire and against common right and issuing out of every part of the land, although it is otherwise where part of the lands out of which the rent issues descends on the grantee. If the grantee of a rent-charge purchases part of the land, and the grantor by his deed reciting such purchase, grants that he may distrain for such rent-charge in the residue of the land, this amounts to a new grant. A rent-charge is extinguished by a devise to the grantee of part of the land out of which the rent-charge issues notwithstanding the devise is expressly made over and above the rent-charge."—Shelf. R. P., 8th Ed., 714. See as to apportionment of rent-charges, *Mills* v. *Cobb*, L. R., 2 C. P., 95; *Ley* v. *Ley*, L. R., 6 Eq., 174.

Powers.

Mode of execution of powers.

XXIV. A deed hereafter executed in the presence of, and attested by, two or more witnesses in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity: Provided always, that this provision shall not operate to defeat any direction in the instrument creating the power, that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument: and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend.

22 & 23 Vict., c. 35, s. 12.

Legatee in trust may raise money by sale notwithstanding want of express power in the will.

XXV. Where by any will, which shall come into operation after the passing of this Act, the testator shall have charged his immoveable property or any specific portion thereof with the payment of his debts, or with the payment of any legacy or other specific sum of

SECRETARIAT LIBRARY

APPDX.

money, and shall have bequeathed the property so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such property, it shall be lawful for the said legatee or legatees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy, or money as aforesaid by sale and absolute disposition, by public auction or private contract, of the said property or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other; and any deed or deeds of mortgage so executed may reserve such rate of interest and fix such period or periods of repayment as the person or persons executing the same shall think proper.

22 & 23 Vict., c. 35, s. 14. See Shelf. R. P., 8th Ed., 484.

Powers given by last section extended to survivors, legatees, &c.

XXVI. The powers conferred by the last preceding section shall extend to all and every person or persons in whom the property bequeathed in trust shall for the time being be vested by survivorship, or under the laws relating to intestate or testamentary succession, or to any person or persons who may be appointed under any power in the will, or by the High Court, to succeed to the trusteeship vested in such legatee or legatees in trust as aforesaid.

22 & 23 Vict., c. 35, s. 15.

Executors to have power of raising money, &c, where there is no sufficient bequest.

XXVII. If any testator who shall have created such a charge as is described in section 25 of this Act shall not have bequeathed the property charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors (if any) for the time being named in such will shall have the same or the like power of raising the said moneys as is hereinbefore vested in the legatee or legatees in trust of the said property, and such power shall from time to time devolve in, and become vested in, the person or persons (if any) in whom the executorship shall for the time being be vested.

22 & 23 Vict., c. 35, s. 16.

Purchasers, &c., not bound to enquire as to powers.

XXVIII. Purchasers or mortgagees shall not be bound to enquire whether the powers conferred by sections 25, 26, and 27 of this Act, or any of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof.

22 & 23 Vict., c. 35, s. 17.

Inheritance.

Descent how to be traced.

XXIX. In cases of intestacies occurring before the first day of January, 1866, where there shall be a total failure of heirs of the purchaser, or where any immoveable property shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the property shall descend, and the descent shall thenceforth be traced from the person last entitled to the property as if he had been the purchaser thereof. This section shall be read as part of Act No. XXX of 1839 (for the amendment of the Law of Inheritance).

22 & 23 Vict., c. 35, s. 19.

Assignment of Moveables and Terms for Years.

Assignment to self and others.

XXX. Any person shall have power to assign moveable property now by law assignable, terms for years of immoveable property, and estates by *elegit*, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another.

22 & 23 Vict., c. 235, s. 21.

At common law, a man could not assign personalty to himself and another, a rule which occasioned inconvenience in the transfer of trust-property. By this section the continuing and retiring trustees can assign directly to the continuing and new trustees. See *ante*, p. 327, as to appointment of new trustees.

Purchasers.

Not to be bound to see to the application of purchase-money, &c.

XXXI. The *bonâ fide* payment to, and the receipt of, any person to whom any purchase or mortgage-money shall be payable upon any express or implied trust shall effectually discharge the person paying the same from seeing to the application thereof, or being answerable for the misapplication thereof.

22 & 23 Vict., c. 35, s. 23.

See Lewin, 7th Ed., pp. 269, 270, 409, 420, & 425; Shelf. R. P., 8th Ed., 488; and *ante*, pp. 171, 228.

Investment of Trust-Funds.

On what securities trust-funds may be invested.

XXXII. Trustees having trust-money in their hands, which it is their duty to invest at interest, shall be at liberty, at their discretion, to invest the same in any Government securities, and such trustees shall also be at liberty,

APPDX.

at their discretion, to call in any trust-funds invested in any other securities than as aforesaid, and to invest the same on any such securities as aforesaid, and also from time to time, at their discretion, to vary any such investments as aforesaid for others of the same nature: Provided always, that no such original investment as aforesaid, and no such change of investment as aforesaid, shall be made where there is a person under no disability entitled in possession to receive the income of the trust-fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person.

23 & 24 Vict., c. 145, s. 25. See *ante*, pp. 164, 226. Partially repealed, *ante*, p. 443.

Trustees and Executors.

Trustees may apply income of property of minors, &c., for their maintenance.

XXXIII. In all cases where any property is held by trustees in trust for a minor, either absolutely or contingently on his attaining majority, or on the occurrence of any event previously to his attaining majority, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such minor, or otherwise to apply for or towards the maintenance or education of such minor, the whole or any part of the income to which such minor may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide such maintenance or education or not; and such trustees shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen: Provided always, that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

23 & 24 Vict., c. 145, s. 26. See *ante*, p. 227. Partially repealed, *ante*, p. 443.

Provisions for appointment of new trustees, on death, &c.

XXXIV. Whenever any trustee, either original or substituted, and whether appointed by any High Court or otherwise, shall die, or be six months absent from British India, or desire to be discharged from, or refuse, or become unfit or incapable to act in the trusts or powers in him reposed, before the same shall have been fully discharged and

performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will, or other instrument creating the trust (if any), or if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor, or administrators or administrator of the last surviving and continuing trustee, or for the retiring trustees if they shall all retire simultaneously, or for the last retiring trustee, or where there are two or more classes of trustees of the instrument creating the trust, then for the surviving or continuing trustees or trustee of the class in which any such vacancy or disqualification shall occur (and for this purpose any refusing or retiring trustee shall, if willing to act in the execution of the power, be considered a continuing trustee) by writing to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or being absent from British India, or desiring to be discharged, or refusing or becoming unfit or incapable to act as aforesaid. So often as any new trustee or trustees shall be so appointed as aforesaid, all the trust-property (if any) which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors, or administrators of any trustee, shall with all convenient speed be conveyed and transferred, so that the same may be legally and effectually vested in such new trustee or trustees, either solely or jointly with the surviving or continuing trustees or trustee, as the case may require. Every new trustee to be appointed as aforesaid, as well before as after such conveyance or transfer as aforesaid, and also every trustee appointed by any High Court either before or after the passing of this Act, shall have the same powers, authorities, and discretions, and shall in all respects act as if he had been originally nominated a trustee by the deed, will, or other instrument (if any) creating the trust. The Official Trustee may, with his consent and by the order of the High Court, be appointed under this section in any case in which only one trustee is to be appointed, and such trustee is to be the sole trustee.

23 & 24 Vict., c. 145, s. 72. See *ante*, p. 333. Partially repealed, *ante*, p. 413.

This section does not take away the jurisdiction of the Court to increase the original number of trustees.—*Viscountess D'Adhemar* v. *Bertrand*, 35 Beav., 19.

"Where an instrument contains an express power to appoint new trustees in more restricted terms than the statutory powers, it seems doubtful whether the latter is excluded.—*Re Jackson*, 16 W. R. (Eng.), 572. Where a will contained an express power exercisable by the surviving or continuing trustees, and, all the trustees having died, an application was made to the Court to appoint new trustees, MALINS, V. C., made the order, although it was opposed, on the ground that, under

APPDX.

this section, the executor of the surviving trustee was competent to make the appointment.—*Ibid.* But where a deed of separation contained an express power, and, one of the trustees having died, the husband applied that a trustee, whom he had himself selected, should be appointed by the Court, Lord ROMILLY dismissed the petition with costs, on the ground that, by this section, the power was conferred on the surviving trustee."—*Re Soulby*, 21 W. R. (Eng.), 256. See Shelf. R. P., 8th Ed., 740.

Appointment of new trustee in place of trustee predeceasing testator.

XXXV. The power of appointing new trustees hereinbefore contained may be exercised in cases where a trustee nominated in a will has died in the lifetime of the testator.

23 & 24 Vict., c. 145, s. 28. Partially repealed, *ante*, p. 443.

Trustees' receipts to be discharges.

XXXVI. The receipts of any trustees or trustee for any money payable to them or him by reason, or in the exercise, of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof.

23 & 24 Vict., c. 145, s. 29. See *ante*, p. 229. Partially repealed, *ante*, p. 443.

Every trust-instrument to be deemed to contain clauses for the indemnity and reimbursement of the trustees.

XXXVII. Every deed, will, or other instrument creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following,—that is to say, "that the trustees or trustee for the time being of the said deed, will, or other instrument, shall be respectively chargeable only for such moneys, stocks, funds, and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust-moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will, or other instrument, to reimburse themselves or

himself, or pay or discharge out of the trust-premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will, or other instrument.

22 & 23 Vict., c. 35, s. 31. See *ante*, p. 210. Partially repealed, *ante*, p. 443.

Executors may compound &c.

XXXVIII. It shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition, or any security for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims, and things whatsoever relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give, and execute such agreements, instrument of composition, releases, and other things as they shall think expedient, without being responsible for any loss to be occasioned thereby.

23 & 24 Vict., c. 145, s. 30. See *ante*, p. 222.

Trustee, &c., making payment under power-of-attorney, not to be liable by reason of death of party giving such power.

XXXIX. No trustee, executor, or administrator making any payment, or doing any act *bonâ fide* under or in pursuance of any power-of-attorney, shall be liable for the moneys so paid, or the act so done, by reason that the person who gave the power-of-attorney was dead at the time of such payment or act, or had done some act to avoid the power: Provided that the fact of the death, or of the doing of such act as last aforesaid, at the time of such payment or act *bonâ fide* done as aforesaid by such trustee, executor, or administrator, was not known to him: Provided always, that nothing herein contained shall in any manner affect or prejudice the right of any person entitled to the money against the person to whom such payment shall have been made, but that such person so entitled shall have the same remedy against such person to whom such payment shall be made, as he would have had against the trustee, executor, or administrator, if the money had not been paid away under such power-of-attorney.

22 & 23 Vict., c 35, s. 26.

At common law, an act done under a power-of-attorney after the death of the grantor is void, as the power is revoked by the death.—*Watson* v. *King*, 4 Camp., 272. But in equity, such act is valid if done *bonâ fide*, and without notice of the death.—*Bailey* v. *Collett*, 18 Beav., 179.

See *ante*, p. 208.

APPDX.

As to liability of executor or administrator in respect of rents, covenants, or agreements.

XL. Where an executor or administrator liable as such to the rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned, whether before or after the passing of this Act, to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due, and been claimed up to the time of the assignment hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee, to be laid out on the property demised or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to the purchaser thereof, he shall be at liberty to distribute the residuary estate of the deceased to and amongst the parties entitled thereto respectively without appropriating any part, or any further part (as the case may be), of the estate of the deceased to meet any future liability under the said lease or agreement for a lease. The executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease. Nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed.

22 & 23 Vict., c. 35, s. 27.

This section protects an executor though he has not applied to the Court. It is retrospective —*Smith* v. *Smith*, 1 Dr. and Sm., 384; *Re Green*, 2 De.G. F. and J., 121.

As to liability of executor, &c., in respect of rents, &c., in conveyance on rent-charge.

XLI. In like manner, where an executor or administrator liable as such to the rent, covenants, or agreements contained in any conveyance on chief rent or rent-charge (whether any such rent be by limitation of use, grant, or reservation), or agreement for such conveyance, granted or assigned to, or made and entered into with, the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said conveyance or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee, to be laid out on the property conveyed or agreed to be conveyed, although the period for laying out the

same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary estate of the deceased to and amongst the parties entitled thereto, respectively, without appropriating any part or any further part (as the case may be) of such estate to meet any future liability under the said conveyance or agreement for a conveyance. The executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance or agreement for conveyance. Nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed.

22 & 23 Vict., c. 35, s. 28.

As to distribution of the assets of testator or intestate after notice given by executor and administrator

XLII. Where an executor or administrator shall have given such or the like notices as, in the opinion of the Court in which such executor or administrator is sought to be charged, would have been given by the High Court in an administration-suit for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets, or any part thereof, so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof, as the case may be. Nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, into the hands of the person or persons who may have received the same respectively.

22 & 23 Vict., c. 35, s. 29.

Trustee, executor, &c., may apply by petition to Judge of High Court for opinion, advice, &c., in management, &c., of trust-property.

XLIII. Any trustee, executor, or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court for the opinion, advice, or direction of such Judge on any question respecting the management or administration of the trust-property or the assets of any testator or intestate. Such applica-

APPDX.

tion shall be served upon, or the hearing thereof shall be attended by, all persons interested in such application, or such of them as the said Judge shall think expedient. The trustee, executor, or administrator acting upon the opinion, advice, or direction given by the said Judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator in the subject-matter of the said application: Provided, nevertheless, that this Act shall not extend to indemnify any trustee, executor, or administrator in respect of any act done in accordance with such opinion, advice, or direction as aforesaid, if such trustee, executor, or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction; and the costs of such application as aforesaid shall be in the discretion of the Judge to whom the said application shall be made.

22 & 23 Vict., c. 35, s. 30. See *ante*, p. 218.

General Provisions.

Tenants-for-life, &c., may execute powers, notwithstanding incumbrances.

XLIV. For the purpose of this Act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and income of immoveable or moveable property, although his estate may be charged or incumbered, either by himself or by any former owner, or otherwise, however, to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid, unless they shall concur therein.

19 & 20 Vict., c. 120, s. 41.

Operation of Act.

XLV. The provisions contained in this Act shall, except as hereinbefore otherwise provided, extend only to persons entitled or acting under a deed, will, codicil or other instrument executed after this Act comes into operation, or under a will or codicil confirmed or revived by a codicil executed after that date, and only to property in British India and to cases to which English law is applicable.

23 & 24 Vict., c. 145, s. 34.

Short title.

XLVI. This Act may be called "The Trustees' and Mortgagees' Powers Act, 1866."

ACT I OF 1880.

An Act to confer certain powers on Religious Societies.

Preamble.

WHEREAS it is expedient to simplify the manner in which certain bodies of persons associated for the purpose of maintaining religious worship may hold property acquired for such purpose, and to provide for the dissolution of such bodies and the adjustment of their affairs and the decision of certain questions relating to such bodies: It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Religious Societies Act, 1880."

Commencement.

Local extent.

It shall come into force at once; and shall extend to the whole of British India; but nothing herein contained shall apply to any Hindus, Muhammadans or Buddhists; or to any persons to whom the Governor-General in Council may, from time to time, by notification in the *Gazette of India*, exclude from the operation of this Act.

Appointment of new trustees in cases not otherwise provided for.

2. When any body of persons associated for the purpose of maintaining religious worship has acquired, or hereafter shall acquire, any property, and such property has been, or hereafter shall be, vested in trustees in trust for such body, and it becomes necessary to appoint a new trustee in the place of, or in addition to, any such trustee or any trustee appointed in the manner hereinafter prescribed, and no manner of appointing such new trustee is prescribed by any instrument by which such property was so vested or by which the trusts on which it is held have been declared, or such new trustee cannot for any reason be appointed in the manner so prescribed, such new trustee may be appointed in such manner as may be agreed upon by such body, or by a majority of not less than two-thirds of the members of such body actually present at the meeting at which the appointment is made.

Appointment under section 2 to be recorded in a memorandum under the hand of the chairman of the meeting.

3. Every appointment of new trustees under section 2 shall be made to appear by some memorandum under the hand of the chairman for the time being of the meeting at which such appointment is made. Such memorandum shall be in the form set forth in the schedule hereto annexed, or as near thereto as circumstances allow, shall be executed and attested by two or more credible witnesses in the presence of such meeting, and shall be deemed to be a document of which the registration is required by the Indian Registration Act of 1877, section 17.

APPDX.

Property to vest in new trustees.

4. When any new trustees have been appointed, whether in the manner prescribed by any such instrument as aforesaid or in the manner hereinbefore provided, the property subject to the trust shall forthwith, notwithstanding anything contained in any such instrument, become vested, without any conveyance or other assurance, in such new trustees and the old continuing trustees jointly, or, if there are no old continuing trustees, in such new trustees wholly, upon the same trusts and with and subject to the same powers and provisions, as it was vested in the old trustees.

Saving of existing modes of appointment and conveyance.

5. Nothing herein contained shall be deemed to invalidate any appointment of new trustees, or any conveyance of any property, which may hereafter be made as heretofore was by law required.

Provisions for dissolution of societies and adjustment of their affairs.

6. Any number not less than three-fifths of the members of any such body as aforesaid may, at any meeting convened for the purpose, determine that such body shall be dissolved, and thereupon it shall be dissolved forthwith, or at the time then agreed upon; and all necessary steps shall be taken for the disposal and settlement of the property of such body, its claims and liabilities according to the rules of such body applicable thereto, if any, and if not, then as such body at such meeting may determine.

Provided that, in the event of any dispute arising among the members of such body, the adjustment of its affairs shall be referred to the principal Court of original civil jurisdiction of the district in which the chief building of such body is situate; and the Court shall make such order in the matter as it deems fit.

Upon a dissolution no member to receive profit.

7. If upon the dissolution of any such body there remains, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of such body or any of them, but shall be given to some other body of persons associated for the purpose of maintaining religious worship or some other religious or charitable purpose to be determined by the votes of not less than three-fifths of the members present at a meeting convened in this behalf, or in default thereof by such Court as last aforesaid.

Saving of certain provisions of instruments.

8. Nothing in sections 6 and 7 shall be deemed to affect any provision contained in any instrument for the dissolution of such body, or for the payment or distribution of such property.

Questions may be submitted to High Court.

9. When any question arises, either in connection with the matters hereinbefore referred to, or otherwise, as to whether any person is a member of any such body as aforesaid, or as to the validity of any appointment under this Act, any person interested in such question may apply by petition to the High Court for its opinion on such question. A copy of such petition shall be served upon, and the hearing thereof may be attended by, such other person interested in the question as the Court thinks fit.

Any opinion given by the Court on an application under this section shall be deemed to have the force of a declaratory decree.

The costs of every application under this section shall be in the discretion of the Court.

THE SCHEDULE.

(*See section* 3.)

Memorandum of the appointment of new trustees of the (*describe the church, chapel or other buildings and property*) situate at a meeting duly convened and held for that purpose (*in the vestry of the said*) on the day of 18 , *A. B.*, of Chairman.

Names and descriptions of all the trustees on the constitution or last appointment of trustees made the day of (*here insert the same*).

Names and descriptions of all the trustees in whom the said (*chapel and property*) now become legally vested.

First.—Old continuing trustees :—

(*here insert the same*).

Second.—New trustees now chosen and appointed :—

(*here insert the same*).

Dated this day of 18 .

Signed by the said *A. B.*, as Chairman of the said Meeting, at and in the presence of the said Meeting, on the day and year aforesaid, in the presence of

A. B.,
Chairman of the said Meeting.

C. D.
E. F.

APPDX.

THE INDIAN TRUSTS ACT.

ACT II OF 1882.

An Act to define and amend the law relating to Private Trusts and Trustees.

Preamble.

WHEREAS it is expedient to define and amend the law relating to private trusts and trustees; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title.
Commencement.

1. This Act may be called "The Indian Trusts Act, 1882": and it shall come into force on the first day of March, 1882.

Local extent.

It extends in the first instance to the territories respectively administered by the Governor of Madras in Council, the Lieutenant-Governors of the North-West Provinces and the Punjab, the Chief Commissioners of Oudh, the Central Provinces, Coorg and Assam; and the Local Government may from time to time, by notification in the official Gazette, extend it to any other part of British India.

Savings.

But nothing herein contained affects the rules of Muhammadan law as to *waqf* (a), or the mutual relations of the members of an undivided family as determined by any customary or personal law (b), or applies to public or private religious or charitable endowments (c), or to trusts to distribute prizes taken in war among the captors (d); and nothing in the second chapter of this Act applies to trusts created before the said day.

(a) *Ante*, p. 380.
(b) As to waste by Hindu widow, see *ante*, p 145, and as to liability of karta to account, see p. 158; as to purchaser from manager of a joint Hindu family, p. 306.
(c) See p. 349.
(d) See p. 124.

Repeal of enactments.

2. The Statute and Acts mentioned in the schedule hereto annexed shall, to the extent mentioned in the said schedule, be repealed in the territories to which this Act for the time being extends.

Interpretation-clause.
'trust':

3. A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him, for the benefit of another, or of another and the owner (a):

the person who reposes or declares the confidence is called the 'author of the trust': the person who accepts the confidence is called the 'trustee': the person for whose benefit the confidence is accepted is called the 'beneficiary': the subject-matter of the trust is called 'trust-property' or 'trust-money': 'the beneficial interest' or 'interest' of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument, if any, by which the trust is declared is called the 'instrument of trust': a breach of any duty imposed on a trustee, as such, by any law for the time being in force, is called a 'breach of trust': and in this Act, unless there be something repugnant in the subject or context, 'registered' means registered under the law for the registration of documents for the time being in force: a person is said to have 'notice' of a fact either when he actually knows that fact or when, but for wilful abstention from inquiry or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent, under the circumstances mentioned in the Indian Contract Act, 1872, section 229 (b); and all expressions used herein and defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respectively attributed to them by that Act.

'author of the trust': 'trustee': 'beneficiary': 'trust-property': 'instrument of trust': 'breach of trust': 'registered': 'notice.' Expressions defined in Act IX of 1872.

(a) See p. 16.
(b) See p. 276.

CHAPTER II.

OF THE CREATION OF TRUSTS.

4. A trust may be created for any lawful purpose. The purpose of a trust is lawful unless it is (*a*) forbidden by law, or (*b*) is of such a nature that, if permitted, it would defeat the provisions of any law, or (*c*) is fraudulent, or (*d*) involves or implies injury to the person or property of another, or (*e*) the Court regards it as immoral or opposed to public policy.

Lawful purpose.

Every trust of which the purpose is unlawful is void. And where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes cannot be separated, the whole trust is void.

APPDX.

Explanation.—In this section, the expression 'law' includes, where the trust-property is immoveable and situate in a foreign country, the law of such country.

Illustrations.

(*a.*) *A* conveys property to *B* in trust to apply the profits to the nurture of female foundlings to be trained up as prostitutes. The trust is void.

(*b.*) *A* bequeaths property to *B* in trust to employ it in carrying on a smuggling business, and out of the profits thereof to support *A's* children. The trust is void.

(*c.*) *A*, while in insolvent circumstances, transfers property to *B* in trust for *A* during his life, and after his death for *B*. *A* is declared an insolvent. The trust for *A* is invalid as against his creditors.

See Lect. I, pp. 19-50.

Trust of immoveable property.

5. No trust in relation to immoveable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.

Trust of moveable property.

No trust in relation to moveable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee.

These rules do not apply where they would operate so as to effectuate a fraud.

See Lect. II, p. 51.

Creation of trust.

6. Subject to the provisions of section five, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts (*a*) an intention on his part to create thereby a trust, (*b*) the purpose of the trust, (*c*) the beneficiary, and (*d*) the trust-property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust-property to the trustee.

Illustrations.

(*a.*) *A* bequeaths certain property to *B*, "having the fullest confidence that he will dispose of it for the benefit of" *C*. This creates a trust so far as regards *A* and *C*.

(*b.*) *A* bequeaths certain property to *B*, "hoping he will continue it in the family." This does not create a trust, as the beneficiary is not indicated with reasonable certainty.

(*c.*) *A* bequeaths certain property to *B*, requesting him to distribute it amongst such members of *C's* family as *B* should think most deserving. This does not create a trust, for the beneficiaries are not indicated with reasonable certainty.

(*d.*) *A* bequeaths certain property to *B*, desiring him to divide the bulk of it among *C's* children. This does not create a trust, for the trust-property is not indicated with sufficient certainty.

(*e*.) *A* bequeaths a shop and stock-in-trade to *B*. on condition that he pays *A's* debts and a legacy to *C*. This is a condition, not a trust for *A's* creditors and *C*.

As to implied trusts, see Lect. III, and as to benami transactions and constructive trusts, Lect. IV.

Who may create trusts.

7. A trust may be created—

(*a*) by every person competent to contract, and,

(*b*) with the permission of a principal Civil Court of original jurisdiction, by or on behalf of a minor;

but subject in each case to the law for the time being in force as to the circumstances and extent in and to which the author of the trust may dispose of the trust-property.

See p. 124.

Subject of trust.

8. The subject-matter of a trust must be property transferable to the beneficiary.

It must not be a merely beneficial interest under a subsisting trust.

See p. 25.

Who may be beneficiary.

9. Every person capable of holding property may be a beneficiary.

Disclaimer by beneficiary.

A proposed beneficiary may renounce his interest under the trust by disclaimer addressed to the trustee, or by setting up, with notice of the trust, a claim inconsistent therewith.

See p. 127.

Who may be trustee.

10. Every person capable of holding property may be a trustee: but where the trust involves the exercise of discretion, he cannot execute it unless he is competent to contract (a).

No one bound to accept trust.

No one is bound to accept a trust (b).

Acceptance of trust.

A trust is accepted by any words or acts of the trustee indicating with reasonable certainty such acceptance (c).

Disclaimer of trust.

Instead of accepting a trust, the intended trustee may, within a reasonable period, disclaim it, and such disclaimer shall prevent the trust-property from vesting in him.

A disclaimer by one of two or more co-trustees vests the trust-property in the other or others, and makes him or them sole trustee or trustees from the date of the creation of the trust (d).

APPDX.

Illustrations.

(*a.*) *A* bequeaths certain property to *B* and *C*, his executors, as trustees for *D*. *B* and *C* prove *A's* will. This is in itself an acceptance of the trust, and *B* and *C* hold the property in trust for *D*.

(*b.*) *A* transfers certain property to *B* in trust to sell it and to pay out of the proceeds *A's* debts. *B* accepts the trust and sells the property. So far as regards *B*, a trust of the proceeds is created for *A's* creditors.

(*c.*) *A* bequeaths a lakh of rupees to *B* upon certain trusts, and appoints him his executor. *B* severs the lakh from the general assets and appropriates it to the specific purpose. This is an acceptance of the trust.

(a) See p. 127.
(b) See p. 132.
(c) See p. 120.
(d) See p 132.

CHAPTER III.

Of the Duties and Liabilities of Trustees.

Trustee to execute trust.

11. The trustee is bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation, except as modified by the consent of all the beneficiaries being competent to contract.

Where the beneficiary is incompetent to contract, his consent may, for the purposes of this section, be given by a principal Civil Court of original jurisdiction.

Nothing in this section shall be deemed to require a trustee to obey any direction when to do so would be impracticable, illegal or manifestly injurious to the beneficiaries.

Explanation.—Unless a contrary intention be expressed, the purpose of a trust for the payment of debts shall be deemed to be (*a*) to pay only the debts of the author of the trust existing and recoverable at the date of the instrument of trust, or, when such instrument is a will, at the date of his death; and (*b*) in the case of debts not bearing interest, to make such payment without interest.

Illustrations.

(*a.*) *A*, a trustee, is simply authorized to sell certain land by public auction. He cannot sell the land by private contract.

(*b.*) *A*, a trustee of certain land for *X*, *Y* and *Z*, is authorized to sell the land to *B* for a specified sum. *X*, *Y* and *Z*, being competent to contract, consent that *A* may sell the land to *C* for a less sum. *A* may sell the land accordingly.

(*c.*) *A*, a trustee for *B* and her children, is directed by the author of the trust to lend, on *B's* request, trust-property to *B's* husband, *C*, on the security of his bond. *C* becomes insolvent, and *B* requests *A* to make the loan. *A* may refuse to make it.

See p. 135.

Trustee to inform himself of state of trust-property.

12. A trustee is bound to acquaint himself, as soon as possible, with the nature and circumstances of the trust-property; to obtain, where necessary, a transfer of the trust-property to himself; and (subject to the provisions of the instrument of trust) to get in trust-moneys invested on insufficient or hazardous security.

Illustrations.

(*a*.) The trust-property is a debt outstanding on personal security. The instrument of trust gives the trustee no discretionary power to leave the debt so outstanding. The trustee's duty is to recover the debt without unnecessary delay.

(*b*.) The trust-property is money in the hands of one of two co-trustees. No discretionary power is given by the instrument of trust. The other co-trustee must not allow the former to retain the money for a longer period than the circumstances of the case require

See p. 136.

Trustee to protect title to trust-property.

13. A trustee is bound to maintain and defend all such suits, and (subject to the provisions of the instrument of trust) to take such other steps as, regard being had to the nature and amount or value of the trust-property, may be reasonably requisite for the preservation of the trust-property and the assertion or protection of the title thereto.

Illustration.

The trust-property is immoveable property which has been given to the author of the trust by an unregistered instrument. Subject to the provisions of the Indian Registration Act, 1877, the trustee's duty is to cause the instrument to be registered.

See p. 137.

Trustee not to set up title adverse to beneficiary.

14. The trustee must not for himself or another set up or aid any title to the trust-property adverse to the interest of the beneficiary.

See p. 155.

Care required from trustee.

15. A trustee is bound to deal with the trust-property as carefully as a man of ordinary prudence would deal with such property if it were his own; and, in the absence of a contract to the contrary, a trustee so dealing is not responsible for the loss, destruction or deterioration of the trust-property.

Illustrations.

(*a*.) *A*, living in Calcutta, is a trustee for *B*, living in Bombay. *A* remits trust-funds to *B* by bills drawn by a person of undoubted credit in favor of the trustee as such, and payable at Bombay. The bills are dishonoured. *A* is not bound to make good the loss.

APPDX.

(*b.*) *A*, a trustee of leasehold property, directs the tenant to pay the rents on account of the trust to a banker, *B*, then in credit. The rents are accordingly paid to *B*, and *A* leaves the money with *B* only till wanted. Before the money is drawn out, *B* becomes insolvent. *A*, having had no reason to believe that *B* was in insolvent circumstances, is not bound to make good the loss.

(*c.*) *A*, a trustee of two debts for *B*, releases one and compounds the other in good faith, and reasonably believing that it is for *B's* interest to do so. *A* is not bound to make good any loss caused thereby to *B*.

(*d.*) *A*, a trustee directed to sell the trust-property by auction, sells the same, but does not advertise the sale and otherwise fails in reasonable diligence in inviting competition. *A* is bound to make good the loss caused thereby to the beneficiary.

(*e.*) *A*, a trustee for *B*, in execution of his trust, sells the trust-property, but from want of due diligence on his part fails to receive part of the purchase-money. *A* is bound to make good the loss thereby caused to *B*.

(*f.*) *A*, a trustee for *B* of a policy of insurance, has funds in hand for payment of the premiums *A* neglects to pay the premiums, and the policy is consequently forfeited. *A* is bound to make good the loss to *B*.

(*g.*) *A* bequeaths certain moneys to *B* and *C* as trustees, and authorizes them to continue trust-moneys upon the personal security of a certain firm in which *A* had himself invested them. *A* dies, and a change takes place in the firm. *B* and *C* must not permit the moneys to remain upon the personal security of the new firm.

(*h.*) *A*, a trustee for *B*, allows the trust to be executed solely by his co-trustee, *C*. *C* misapplies the trust-property. *A* is personally answerable for the loss resulting to *B*.

See p. 140.

Conversion of perishable property.

16. Where the trust is created for the benefit of several persons in succession, and the trust-property is of a wasting nature or a future or reversionary interest, the trustee is bound, unless an intention to the contrary may be inferred from the instrument of trust, to convert the property into property of a permanent and immediately profitable character.

Illustrations.

(*a.*) *A* bequeaths to *B* all his property in trust for *C* during his life, and on his death for *D*, and on *D's* death for *E*. *A's* property consists of three leasehold houses, and there is nothing in *A's* will to show that he intended the houses to be enjoyed in specie. *B* should sell the houses, and invest the proceeds in accordance with section twenty.

(*b.*) *A* bequeaths to *B* his three leasehold houses in Calcutta and all the furniture therein in trust for *C* during his life, and on his death for *D*, and on *D's* death for *E*. Here an intention that the houses and furniture should be enjoyed in specie appears clearly, and *B* should not sell them.

See p. 148.

Trustee to be impartial.

17. Where there are more beneficiaries than one, the trustee is bound to be impartial, and must not execute the trust for the advantage of one at the expense of another.

Where the trustee has a discretionary power, nothing in this section shall be deemed to authorize the Court to control the exercise reasonably and in good faith of such discretion.

Illustration.

A, a trustee for *B*, *C* and *D*, is empowered to choose between several specified modes of investing the trust-property. *A* in good faith chooses one of these modes The Court will not interfere, although the result of the choice may be to vary the relative rights of *B*, *C* and *D*.

See p. 152.

Trustee to prevent waste.

18. Where the trust is created for the benefit of several persons in succession, and one of them is in possession of the trust-property, if he commits, or threatens to commit, any act which is destructive or permanently injurious thereto, the trustee is bound to take measures to prevent such act.

See p. 142.

Accounts and information.

19. A trustee is bound (*a*) to keep clear and accurate accounts of the trust-property, and (*b*) at all reasonable times, at the request of the beneficiary, to furnish him with full and accurate information as to the amount and state of the trust-property.

See p. 157.

Investment of trust-money.

20. Where the trust-property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound (subject to any direction contained in the instrument of trust) to invest the money on the following securities, and on no others :—

(*a*) in promissory notes, debentures, stock or other securities of the Government of India, or of the United Kingdom of Great Britain and Ireland ;

(*b*) in bonds, debentures and annuities charged by the Imperial Parliament on the revenues of India ;

(*c*) in stock or debentures of, or shares in, Railway or other companies, the interest whereon shall have been guaranteed by the Secretary of State for India in Council ;

(*d*) in debentures or other securities for money issued by, or on behalf of, any municipal body under the authority of any Act of a Legislature established in British India ;

(*e*) on a first mortgage of immoveable property situate in British India : Provided that the property is not a leasehold for a term of years and that the value of the property exceeds by one-

APPDX. third, or, if consisting of buildings, exceeds by one-half, the mortgage-money; or

(*f*) on any other security expressly authorized by the instrument of trust, or by any rule which the High Court may from time to time prescribe in this behalf.

Provided that, where there is a person competent to contract and entitled in possession to receive the income of the trust-property for his life, or for any greater estate, no investment on any security mentioned or referred to in clauses (*d*), (*e*) and (*f*) shall be made without his consent in writing.

See p. 160, and compare ss. 5 and 32 of Act XVIII of 1866, *ante*, pp. 445, 453.

Mortgage of land pledged to Government under Act XXVI of 1871.

21. Nothing in section twenty shall apply to investments made before this Act comes into force, or shall be deemed to preclude an investment on a mortgage of immoveable property already pledged as security for an advance under the Land Improvement Act, 1871, or, in case the trust-money does not exceed three thousand rupees, a deposit thereof in a Government Savings Bank.

Deposit in Government Savings Bank.

Sale by trustee directed to sell within specified time.

22. Where a trustee directed to sell within a specified time extends such time, the burden of proving, as between himself and the beneficiary, that the latter is not prejudiced by the extension lies upon the trustee, unless the extension has been authorized by a principal Civil Court of original jurisdiction.

Illustration.

A bequeaths property to *B*, directing him, with all convenient speed and within five years, to sell it, and apply the proceeds for the benefit of *C*. In the exercise of reasonable discretion, *B* postpones the sale for six years. The sale is not thereby rendered invalid, but *C*, alleging that he has been injured by the postponement, institutes a suit against *B* to obtain compensation. In such suit the burden of proving that *C* has not been injured lies on *B*.

See p. 172.

Liability for breach of trust.

23. Where the trustee commits a breach of trust, he is liable to make good the loss which the trust-property or the beneficiary has thereby sustained, unless the beneficiary has by fraud induced the trustee to commit the breach, or the beneficiary, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, concurred in the breach, or subsequently acquiesced therein, with

full knowledge of the facts of the case and of his rights as against the trustee.

A trustee committing a breach of trust is not liable to pay interest except in the following cases :—

(*a*) where he has actually received interest :

(*b*) where the breach consists in unreasonable delay in paying trust-money to the beneficiary :

(*c*) where the trustee ought to have received interest, but has not done so :

(*d*) where he may be fairly presumed to have received interest.

He is liable, in case (*a*), to account for the interest actually received, and in cases (*b*), (*c*) and (*d*), to account for simple interest at the rate of six per cent. per annum, unless the Court otherwise directs.

(*e*) where the breach consists in failure to invest trust-money and to accumulate the interest or dividends thereon, he is liable to account for compound interest (with half-yearly rests) at the same rate:

(*f*) where the breach consists in the employment of trust-property or the proceeds thereof in trade or business, he is liable to account, at the option of the beneficiary, either for compound interest (with half-yearly rests) at the same rate, or for the nett profits made by such employment.

Illustrations..

(*a.*) A trustee improperly leaves trust-property outstanding, and it is consequently lost: he is liable to make good the property lost, but he is not liable to pay interest thereon.

(*b*) *A* bequeaths a house to *B* in trust to sell it and pay the proceeds to *C*. *B* neglects to sell the house for a great length of time, whereby the house is deteriorated and its market price falls. *B* is answerable to *C* for the loss.

(*c.*) A trustee is guilty of unreasonable delay in investing trust-money in accordance with section twenty, or in paying it to the beneficiary. The trustee is liable to pay interest thereon for the period of the delay.

(*d.*) The duty of the trustee is to invest trust-money in any of the securities mentioned in section twenty, clause (*a*), (*b*), (*c*) or (*d*). Instead of so doing, he retains the money in his hands. He is liable, at the option of the beneficiary, to be charged either with the amount of the principal money and interest, or with the amount of such securities as he might have purchased with the trust-money when the investment should have been made, and the intermediate dividends and interest thereon.

(*e.*) The instrument of trust directs the trustee to invest trust-money either in any of such securities or on mortgage of immoveable property. The trustee does neither. He is liable for the principal money and interest.

(*f.*) The instrument of trust directs the trustee to invest trust-money in any of such securities and to accumulate the dividends thereon. The trustee disregards the direction. He is liable, at the option of the beneficiary, to be charged either with the amount of the principal money and compound interest, or with the amount of such securities as he might have purchased with the trust-money when the investment should have

APPDX.

been made, together with the amount of the accumulation which would have arisen from a proper investment of the intermediate dividends.

(*g*.) Trust-property is invested in one of the securities mentioned in section twenty, clause (*a*), (*b*), (*c*) or (*d*). The trustee sells such security for some purpose not authorized by the terms of the instrument of trust. He is liable, at the option of the beneficiary, either to replace the security with the intermediate dividends and interest thereon, or to account for the proceeds of the sale with interest thereon.

(*h*) The trust-property consists of land. The trustee sells the land to a purchaser for a consideration without notice of the trust. The trustee is liable, at the option of the beneficiary, to purchase other land of equal value to be settled upon the like trust, or to be charged with the proceeds of the sale with interest.

See pp. 181, 190.
As to interest, pp. 178, 291, 313, 314, 318.

No set-off allowed to trustee.

24. A trustee who is liable for a loss occasioned by a breach of trust in respect of one portion of the trust-property cannot set-off against his liability a gain which has accrued to another portion of the trust-property through another and distinct breach of trust.

See p. 192.

Non-liability for predecessor's default.

25. Where a trustee succeeds another, he is not, as such, liable for the acts or defaults of his predecessor.

See p. 193.

Non-liability for co-trustee's default.

26. Subject to the provisions of sections thirteen and fifteen, one trustee is not, as such, liable for a breach of trust committed by his co-trustee:

Provided that, in the absence of an express declaration to the contrary in the instrument of trust, a trustee is so liable—

(*a*) where he has delivered trust-property to his co-trustee without seeing to its proper application:

(*b*) where he allows his co-trustee to receive trust-property and fails to make due enquiry as to the co-trustee's dealings therewith, or allows him to retain it longer than the circumstances of the case reasonably require:

(*c*) where he becomes aware of a breach of trust committed or intended by his co-trustee, and either actively conceals it or does not within a reasonable time take proper steps to protect the beneficiary's interest.

Joining in receipt for conformity.

A co-trustee who joins in signing a receipt for trust-property and proves that he has not received the same is not answerable, by reason of such signature only, for loss or misapplication of the property by his co-trustee.

Illustration.

A bequeaths certain property to *B* and *C*, and directs them to sell it and invest the proceeds for the benefit of *D*. *B* and *C* accordingly sell the property, and the purchase-money is received by *B* and retained in his hands. *C* pays no attention to the matter for two years, and then calls on *B* to make the investment. *B* is unable to do so, becomes insolvent, and the purchase-money is lost. *C* may be compelled to make good the amount.

See p. 193.

Several liability of co-trustees.

27. Where co-trustees jointly commit a breach of trust, or where one of them by his neglect enables the other to commit a breach of trust, each is liable to the beneficiary for the whole of the loss occasioned by such breach.

Contribution as between co-trustees.

But as between the trustees themselves, if one be less guilty than another and has had to refund the loss, the former may compel the latter, or his legal representative to the extent of the assets he has received, to make good such loss; and if all be equally guilty, any one or more of the trustees who has had to refund the loss may compel the others to contribute.

Nothing in this section shall be deemed to authorize a trustee who has been guilty of fraud to institute a suit to compel contribution.

See p. 206.

Non-liability of trustee paying without notice of transfer by beneficiary.

28. When any beneficiary's interest becomes vested in another person, and the trustee, not having notice of the vesting, pays or delivers trust-property to the person who would have been entitled thereto in the absence of such vesting, the trustee is not liable for the property so paid or delivered.

See p. 208.

Liability of trustee where beneficiary's interest is forfeited to Government.

29. When the beneficiary's interest is forfeited or awarded by legal adjudication to Government, the trustee is bound to hold the trust-property to the extent of such interest for the benefit of such person in such manner as the Government may direct in this behalf.

See p. 126.

Indemnity of trustees.

30. Subject to the provisions of the instrument of trust and of sections twenty-three and twenty-six, trustees shall be respectively chargeable only for such moneys, stocks, funds and securities as they respectively actually receive, and shall

APPDX. not be answerable the one for the other of them, nor for any banker, broker or other person in whose hands any trust-property may be placed, nor for the insufficiency or deficiency of any stocks, funds or securities, nor otherwise for involuntary losses.

Compare Act XXVIII of 1866, s. 37, *ante*, p. 456, and ss. 15 and 16 of this Act. See also *ante*, pp. 178, 209, 270.

CHAPTER IV.

Of the Rights and Powers of Trustees.

Right to title-deeds.

31. A trustee is entitled to have in his possession the instrument of trust and all the documents of title (if any) relating solely to the trust-property.

See p. 211.

Right to reimbursement of expenses.

32. Every trustee may reimburse himself, or pay or discharge out of the trust-property, all expenses properly incurred in or about the execution of the trust, or the realization, preservation or benefit of the trust-property, or the protection or support of the beneficiary.

If he pays such expenses out of his own pocket he has a first charge upon the trust-property for such expenses and interest thereon; but such charge (unless the expenses have been incurred with the sanction of a principal Civil Court of original jurisdiction) shall be enforced only by prohibiting any disposition of the trust-property without previous payment of such expenses and interest.

If the trust-property fail, the trustee is entitled to recover from the beneficiary personally on whose behalf he acted, and at whose request, expressed or implied, he made the payment, the amount of such expenses.

Right to be recouped for erroneous overpayment.

Where a trustee has by mistake made an overpayment to the beneficiary, he may reimburse the trust-property out of the beneficiary's interest. If such interest fail, the trustee is entitled to recover from the beneficiary personally the amount of such overpayment.

See p. 212; as to overpayment, p. 180.

Right to indemnity from gainer by breach of trust.

33. A person other than a trustee who has gained an advantage from a breach of trust must indemnify the trustee to the extent of the amount actually received by such person under the breach; and where he is a beneficiary the trustee has a charge on his interest for such amount.

Nothing in this section shall be deemed to entitle a trustee to be indemnified who has, in committing the breach of trust, been guilty of fraud.

See p. 217.

Right to apply to Court for opinion in management of trust-property.

34. Any trustee may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice or direction on any present questions respecting the management or administration of the trust-property other than questions of detail, difficulty or importance, not proper in the opinion of the Court for summary disposal.

A copy of such petition shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit.

The trustee stating in good faith the facts in such petition and acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee in the subject-matter of the application.

The costs of every application under this section shall be in the discretion of the Court to which it is made.

Compare Act XXVIII of 1866, s. 43, *ante*, p. 459, and see p. 218.

Right to settlement of accounts.

35. When the duties of a trustee, as such, are completed, he is entitled to have the accounts of his administration of the trust-property examined and settled; and, where nothing is due to the beneficiary under the trust, to an acknowledgment in writing to that effect.

See p. 219.

General authority of trustee.

36. In addition to the powers expressly conferred by this Act and by the instrument of trust, and subject to the restrictions, if any, contained in such instrument, and to the provisions of section seventeen, a trustee may do all acts which are reasonable and proper for the realization, protection or benefit of the trust-property, and for the protection or support of a beneficiary who is not competent to contract.

Every trustee in the actual possession or receipt of the rents and profits of land as defined in the Land Improvement Act, 1871, shall, for the purposes of that Act, be deemed to be a landlord in possession.

Except with the permission of a principal Civil Court of original jurisdiction, no trustee shall lease trust-property for a term

APPDX. exceeding twenty-one years from the date of executing the lease, nor without reserving the best yearly rent that can be reasonably obtained.

See p. 219.

Power to sell in lots, and either by public auction or private contract.

37. Where the trustee is empowered to sell any trust-property, he may sell the same subject to prior charges or not, and either together or in lots, by public auction or private contract, and either at one time or at several times, unless the instrument of trust otherwise directs.

Power to sell under special conditions.

38. The trustee making any such sale may insert such reasonable stipulations either as to title or evidence of title, or otherwise, in any conditions of sale or contract for sale, as he thinks fit; and may also buy-in the property or any part thereof at any sale by auction, and rescind or vary any contract for sale, and re-sell the property so bought in, or as to which the contract is so rescinded, without being responsible to the beneficiary for any loss occasioned thereby.

Power to buy-in and re-sell.

Time allowed for selling trust-property.

Where a trustee is directed to sell trust-property or to invest trust-money in the purchase of property, he may exercise a reasonable discretion as to the time of effecting the sale or purchase.

Illustrations.

(*a.*) *A* bequeaths property to *B*, directing him to sell it with all convenient speed and pay the proceeds to *C*. This does not render an immediate sale imperative.

(*b.*) *A* bequeaths property to *B*, directing him to sell it at such time and in such manner as he shall think fit, and invest the proceeds for the benefit of *C*. This does not authorize *B*, as between him and *C*, to postpone the sale to an indefinite period.

Compare Act XXVIII of 1866, s. 2, *ante*, p. 444; and see p. 222.

Compare Act XXVIII of 1866, s. 3, *ante*, p. 444, and see p. 223; as to buying in, see p. 224; and as to the time for selling trust-property, see p. 172.

Power to convey.

39. For the purpose of completing any such sale, the trustee shall have power to convey or otherwise dispose of the property sold in such manner as may be necessary.

See p. 225.

Power to vary investments.

40. A trustee may, at his discretion, call in any trust-property invested in any security and invest the same on any of the securities mentioned or referred to in section twenty, and from

time to time vary any such investments for others of the same nature.

Provided that, where there is a person competent to contract and entitled at the time to receive the income of the trust-property for his life, or for any greater estate, no such change of investment shall be made without his consent in writing.

See p. 225.

Power to apply property of minors, &c., for their maintenance, &c.

41. Where any property is held by a trustee in trust for a minor, such trustee may, at his discretion, pay to the guardians (if any) of such minor, or otherwise apply for or towards his maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the whole or any part of the income to which he may be entitled in respect of such property; and such trustee shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in any of the securities mentioned or referred to in section twenty, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations have arisen: Provided that such trustee may, at any time, if he thinks fit, apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

Where the income of the trust-property is insufficient for the minor's maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the trustee may, with the permission of a principal Civil Court of original jurisdiction, but not otherwise, apply the whole or any part of such property for or towards such maintenance, education, advancement or expenses.

Nothing in this section shall be deemed to affect the provisions of any local law for the time being in force relating to the persons and property of minors.

See pp. 221, 226, and Act XXVIII of 1866, s. 33, *ante*, p. 454.

Power to give receipts.

42. Any trustees or trustee may give a receipt in writing for any money, securities or other moveable property payable, transferable or deliverable to them or him by reason, or in the exercise, of any trust or power; and, in the absence of fraud, such receipt shall discharge the person paying, transferring or delivering the same therefrom, and from seeing to the application thereof, or being accountable for any loss or misapplication thereof.

Compare Act XXVIII of 1866, s. 36, *ante*, p. 456; and see p. 229.

APPDX.

Power to compound, &c.

43. Two or more trustees acting together may, if and as they think fit—

(*a*) accept any composition or any security for any debt or for any property claimed;

(*b*) allow any time for payment of any debt;

(*c*) compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the trust; and,

(*d*) for any of those purposes, enter into, give, execute and do such agreements, instruments of composition or arrangement, releases and other things as to them seem expedient, without being responsible for any loss occasioned by any act or thing so done by them in good faith.

The powers conferred by this section on two or more trustees acting together may be exercised by a sole acting trustee when by the instrument of trust, if any, a sole trustee is authorized to execute the trusts and powers thereof.

This section applies only if and as far as a contrary intention is not expressed in the instrument of trust, if any, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

This section applies only to trusts created after this Act comes into force.

See p. 222.

Power to several trustees of whom one disclaims or dies.

44. When an authority to deal with the trust-property is given to several trustees, and one of them disclaims or dies, the authority may be exercised by the continuing trustees, unless from the terms of the instrument of trust it is apparent that the authority is to be exercised by a number in excess of the numbers of the remaining trustees.

Suspension of trustee's powers by decree.

45. Where a decree has been made in a suit for the execution of a trust, the trustee must not exercise any of his powers except in conformity with such decree, or with the sanction of the Court by which the decree has been made, or, where an appeal against the decree is pending, of the Appellate Court.

See p. 232.

CHAPTER V.

OF THE DISABILITIES OF TRUSTEES.

Trustee cannot renounce after acceptance.

46. A trustee who has accepted the trust cannot afterwards renounce it except (*a*) with the permission of a principal Civil Court of original jurisdiction, or (*b*) if the beneficiary is competent to contract, with his consent, or (*c*) by virtue of a special power in the instrument of trust.

See p. 234.

Trustee cannot delegate.

47. A trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger, unless (*a*) the instrument of trust so provides, or (*b*) the delegation is in the regular course of business, or (*c*) the delegation is necessary, or (*d*) the beneficiary, being competent to contract, consents to the delegation.

Explanation.—The appointment of an attorney or proxy to do an act merely ministerial, and involving no independent discretion, is not a delegation within the meaning of this section.

Illustrations.

(*a.*) *A* bequeaths certain property to *B* and *C* on certain trusts, to be executed by them or the survivor of them or the assigns of such survivor. *B* dies. *C* may bequeath the trust-property to *D* and *E* upon the trusts of *A's* will.

(*b.*) *A* is a trustee of certain property with power to sell the same. *A* may employ an auctioneer to effect the sale.

(*c.*) *A* bequeaths to *B* fifty houses let at monthly rents in trust to collect the rents and pay them to *C*. *B* may employ a proper person to collect these rents.

See p. 235.

Co-trustees cannot act singly.

48. When there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides.

See p. 240.

Control of discretionary power.

49. Where a discretionary power conferred on a trustee is not exercised reasonably and in good faith, such power may be controlled by a principal Civil Court of original jurisdiction.

See pp. 153 and 242.

APPDX.

Trustee may not charge for services.

50. In the absence of express directions to the contrary contained in the instrument of trust, or of a contract to the contrary entered into with the beneficiary or the Court at the time of accepting the trust, a trustee has no right to remuneration for his trouble, skill and loss of time in executing the trust.

Nothing in this section applies to any Official Trustee, Administrator-General, Public Curator, or person holding a certificate of administration.

See p. 242.

Trustee may not use trust-property for his own profit.

51. A trustee may not use or deal with the trust-property for his own profit or for any other purpose unconnected with the trust.

See p. 250.

Trustee for sale or his agent may not buy.

52. No trustee whose duty it is to sell trust-property, and no agent employed by such trustee for the purpose of the sale, may, directly or indirectly, buy the same or any interest therein, on his own account or as agent for a third person.

See p. 256.

Trustee may not buy beneficiary's interest without permission.

53. No trustee, and no person who has recently ceased to be a trustee, may, without the permission of a principal Civil Court of original jurisdiction, buy or become mortgagee or lessee of the trust-property or any part thereof; and such permission shall not be given unless the proposed purchase, mortgage or lease is manifestly for the advantage of the beneficiary.

Trustee for purchase.

And no trustee whose duty it is to buy or to obtain a mortgage or lease of particular property for the beneficiary may buy it, or any part thereof, or obtain a mortgage or lease of it or any part thereof, for himself.

See pp. 261 and 289.

Co-trustees may not lend to one of themselves.

54. A trustee or co-trustee whose duty it is to invest trust-money on mortgage or personal security must not invest it on a mortgage by, or on the personal security of, himself or one of his co-trustees.

See p. 265.

CHAPTER VI.

OF THE RIGHTS AND LIABILITIES OF THE BENEFICIARY.

Right to rents and profits.

55. The beneficiary has, subject to the provisions of the instrument of trust, a right to the rents and profits of the trust-property.

See p. 268.

Right to specific execution.

Right to transfer of possession.

56. The beneficiary is entitled to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interest; and, where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries and they are competent to contract, and all of one mind, he or they may require the trustee to transfer the trust-property to him or them, or to such person as he or they may direct.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in the second clause of this section applies to such property during her marriage.

Illustrations.

(*a*.) Certain Government securities are given to trustees upon trust to accumulate the interest until *A* attains the age of 24, and then to transfer the gross amount to him. *A*, on attaining majority, may, as the person exclusively interested in the trust-property, require the trustees to transfer it immediately to him.

(*b*.) *A* bequeaths Rs. 10,000 to trustees upon trust to purchase an annuity for *B*, who has attained his majority, and is otherwise competent to contract. *B* may claim the Rs. 10,000.

(*c*.) *A* transfers certain property to *B*, and directs him to sell or invest it for the benefit of *C*, who is competent to contract. *C* may elect to take the property in its original character.

See p. 271.

Right to inspect and take copies of instrument of trust, accounts, &c.

57. The beneficiary has a right, as against the trustee and all persons claiming under him with notice of the trust, to inspect and take copies of the instrument of trust, the documents of title relating solely to the trust-property, the accounts of the trust-property and the vouchers (if any) by which they are supported, and the cases submitted and opinions taken by the trustee for his guidance in the discharge of his duty.

See p. 272.

APPDX.

Right to transfer beneficial interest.

58. The beneficiary, if competent to contract, may transfer his interest, but subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of such interest:

Provided that when property is transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in this section shall authorize her to transfer such interest during her marriage.

See p. 273.

Right to sue for execution of trust.

59. Where no trustees are appointed or all the trustees die, disclaim or are discharged, or where, for any other reason, the execution of a trust by the trustee is or becomes impracticable, the beneficiary may institute a suit for the execution of the trust, and the trust shall, so far as may be possible, be executed by the Court until the appointment of a trustee or new trustee.

See p. 282.

Right to proper trustees.

60. The beneficiary has a right (subject to the provisions of the instrument of trust) that the trust-property shall be properly protected and held and administered by proper persons and by a proper number of such persons.

Explanation I.—The following are not proper persons within the meaning of this section:—

A person domiciled abroad: an alien enemy: a person having an interest inconsistent with that of the beneficiary: a person in insolvent circumstances; and, unless the personal law of the beneficiary allows otherwise, a married woman and a minor.

Explanation II.—When the administration of the trust involves the receipt and custody of money, the number of trustees should be two at least.

Illustrations.

(*a.*) *A*, one of several beneficiaries, proves that *B*, the trustee, has improperly disposed of part of the trust-property, or that the property is in danger from *B's* being in insolvent circumstances, or that he is incapacitated from acting as trustee. *A* may obtain a receiver of the trust-property.

(*b.*) *A* bequeaths certain jewels to *B* in trust for *C*. *B* dies during *A's* lifetime; then *A* dies. *C* is entitled to have the property conveyed to a trustee for him.

(*c.*) *A* conveys certain property to four trustees in trust for *B*. Three of the trustees die. *B* may institute a suit to have three new trustees appointed in the place of the deceased trustees.

(*d.*) *A* conveys certain property to three trustees in trust for *B*. All the trustees disclaim. *B* may institute a suit to have three trustees appointed in place of the trustees so disclaiming.

(*e.*) *A*, a trustee for *B*, refuses to act, or goes to reside permanently out of British India, or is declared an insolvent, or compounds with his creditors, or suffers a co-trustee to commit a breach of trust. *B* may institute a suit to have *A* removed and a new trustee appointed in his room.

See p. 284.

Right to compel to any act of duty.

61. The beneficiary has a right that his trustee shall be compelled to perform any particular act of his duty as such, and restrained from committing any contemplated or probable breach of trust.

Illustrations.

(*a.*) *A* contracts with *B* to pay him monthly Rs. 100 for the benefit of *C*. *B* writes and signs a letter declaring that he will hold in trust for *C* the money so to be paid. *A* fails to pay the money in accordance with his contract. *C* may compel *B* on a proper indemnity, to allow *C* to sue on the contract in *B's* name.

(*b.*) *A* is trustee of certain land, with a power to sell the same and pay the proceeds to *B* and *C* equally. *A* is about to make an improvident sale of the land. *B* may sue on behalf of himself and *C* for an injunction to restrain *A* from making the sale.

See p. 287.

Wrongful purchase by trustee.

62. Where a trustee has wrongfully bought trust-property, the beneficiary has a right to have the property declared subject to the trust or retransferred by the trustee, if it remains in his hands unsold, or, if it has been bought from him by any person with notice of the trust, by such person. But in such case the beneficiary must repay the purchase-money paid by the trustee, with interest, and such other expenses (if any) as he has properly incurred in the preservation of the property; and the trustee or purchaser must (*a*) account for the nett profits of the property, (*b*) be charged with an occupation-rent, if he has been in actual possession of the property, and (*c*) allow the beneficiary to deduct a proportionate part of the purchase-money if the property has been deteriorated by the acts or omissions of the trustee or purchaser.

Nothing in this section—

(*a*) impairs the right of lessees and others who, before the institution of a suit to have the property declared subject to the trust or retransferred, have contracted in good faith with the trustee or purchaser; or

(*b*) entitles the beneficiary to have the property declared subject to the trust or retransferred where he, being competent to

APPDX. contract, has himself, without coercion or undue influence having been brought to bear on him, ratified the sale to the trustee with full knowledge of the facts of the case and of his rights as against the trustee.

See p. 289.

Following trust-property—
into the hands of third persons;

63. Where trust-property comes into the hands of a third person inconsistently with the trust, the beneficiary may require him to admit formally, or may institute a suit for a declaration, that the property is comprised in the trust.

into that into which it has been converted.

Where the trustee has disposed of trust-property, and the money or other property which he has received therefor can be traced in his hands, or the hands of his legal representative or legatee, the beneficiary has, in respect thereof, rights as nearly as may be the same as his rights in respect of the original trust-property.

Illustrations.

(*a*.) *A*, a trustee for *B* of Rs. 10,000, wrongfully invests the Rs. 10,000 in the purchase of certain land. *B* is entitled to the land.

(*b*.) *A*. a trustee, wrongfully purchases land in his own name, partly with his own money, partly with money subject to a trust for *B*. *B* is entitled to a charge on the land for the amount of the trust-money so misemployed.

See p. 291.

Saving of rights of certain transferees.

64. Nothing in section sixty-three entitles the beneficiary to any right in respect of property in the hands of—

(*a*) a transferee in good faith for consideration without having notice of the trust, either when the purchase-money was paid, or when the conveyance was executed, or—

(*b*) a transferee for consideration from such a transferee.

A judgment-creditor of the trustee attaching and purchasing trust-property is not a transferee for consideration within the meaning of this section.

Nothing in section sixty-three applies to money, currency notes and negotiable instruments in the hands of a *bonâ fide* holder to whom they have passed in circulation, or shall be deemed to affect the Indian Contract Act, 1872, section 108, or the liability of a person to whom a debt or charge is transferred.

See p. 291.

65. Where a trustee wrongfully sells or otherwise transfers trust-property, and afterwards himself becomes the owner of the property, the property again becomes subject to the trust, notwithstanding any want of notice on the part of intervening transferrees in good faith for consideration.

Acquisition by trustee of trust-property wrongfully converted.

See p. 313.

66. Where the trustee wrongfully mingles the trust-property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him.

Right in case of blended property.

See p. 314.

67. If a partner, being a trustee, wrongfully employs trust-property in the business or on the account of the partnership, no other partner is liable therefor in his personal capacity to the beneficiaries, unless he had notice of the breach of trust.

Wrongful employment by partner-trustee of trust-property for partnership purposes.

The partners having such notice are jointly and severally liable for the breach of trust.

Illustrations.

(*a*.) *A* and *B* are partners. *A* dies, having bequeathed all his property to *B* in trust for *Z*, and appointed *B* his sole executor. *B*, instead of winding up the affairs of the partnership, retains all the assets in the business. *Z* may compel him, as partner, to account for so much of the profits as are derived from *A*'s share of the capital. *B* is also answerable to *Z* for the improper employment of *A*'s assets.

(*b*.) *A*, a trader, bequeaths his property to *B* in trust for *C*, appoints *B* his sole executor, and dies. *B* enters into partnership with *X* and *Y* in the same trade, and employs *A*'s assets in the partnership-business. *B* gives an indemnity to *X* and *Y* against the claims of *C*. Here *X* and *Y* are jointly liable with *B* to *C* as having knowingly become parties to the breach of trust committed by *B*.

See p. 319.

68. Where one of several beneficiaries—

(*a*) joins in committing a breach of trust, or

(*b*) knowingly obtains any advantage therefrom, without the consent of the other beneficiaries, or

(*c*) becomes aware of a breach of trust committed or intended to be committed, and either actually conceals it, or does not within a reasonable time take proper steps to protect the interests of the other beneficiaries, or

(*d*) has deceived the trustee, and thereby induced him to commit a breach of trust,

Liability of beneficiary joining in breach of trust.

APPDX.

the other beneficiaries are entitled to have all his beneficial interest impounded as against him and all who claim under him (otherwise than as transferrees for consideration without notice of the breach) until the loss caused by the breach has been compensated.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in this section applies to such property during her marriage.

See p. 322.

Rights and liabilities of beneficiary's transferree.

69. Every person to whom a beneficiary transfers his interest has the rights, and is subject to the liabilities, of the beneficiary in respect of such interest at the date of the transfer.

See p. 324.

CHAPTER VII.

Of Vacating the Office of Trustee.

Office how vacated.

70. The office of a trustee is vacated by his death or by his discharge from his office.

See p. 326.

Discharge of trustee.

71. A trustee may be discharged from his office only as follows :—

(*a*) by the extinction of the trust;

(*b*) by the completion of his duties under the trust;

(*c*) by such means as may be prescribed by the instrument of trust;

(*d*) by appointment under this Act of a new trustee in his place;

(*e*) by consent of himself and the beneficiary, or, where there are more beneficiaries than one, all the beneficiaries being competent to contract, or

(*f*) by the Court to which a petition for his discharge is presented under this Act.

See p. 327.

Petition to be discharged from trust.

72. Notwithstanding the provisions of section eleven, every trustee may apply by petition to a principal Civil Court of original jurisdiction to be discharged from his office; and if the Court finds that there is sufficient reason for such discharge,

it may discharge him accordingly, and direct his costs to be paid out of the trust-property. But where there is no such reason, the Court shall not discharge him, unless a proper person can be found to take his place.

See p. 330.

Appointment of new trustees on death, &c.

73. Whenever any person appointed a trustee disclaims, or any trustee, either original or substituted, dies, or is for a continuous period of six months absent from British India, or leaves British India for the purpose of residing abroad, or is declared an insolvent, or desires to be discharged from the trust, or refuses or becomes, in the opinion of a principal Civil Court of original jurisdiction, unfit or personally incapable to act in the trust, or accepts an inconsistent trust, a new trustee may be appointed in his place by—

(*a*) the person nominated for that purpose by the instrument of trust (if any), or

(*b*) if there be no such person, or no such person able and willing to act, the author of the trust, if he be alive and competent to contract, or the surviving or continuing trustees or trustee for the time being, or legal representative of the last surviving and continuing trustee, or (with the consent of the Court) the retiring trustees, if they all retire simultaneously, or (with the like consent) the last retiring trustee.

Every such appointment shall be by writing under the hand of the person making it.

On an appointment of a new trustee the number of trustees may be increased.

The Official Trustee may, with his consent and by the order of the Court, be appointed under this section, in any case in which only one trustee is to be appointed and such trustee is to be the sole trustee.

The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee if willing to act in the execution of the power.

Compare Act XXVII of 1866, s. 34, *ante*, p. 433; and see p. 333.

Appointment by Court.

74. Whenever any such vacancy or disqualification occurs, and it is found impracticable to appoint a new trustee under section seventy-three, the beneficiary may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for the appointment of a trustee or a new trustee, and the Court may appoint a trustee or a new trustee accordingly.

APPDX.

Rule for selecting new trustees.

In appointing new trustees, the Court shall have regard (*a*) to the wishes of the author of the trust as expressed in or to be inferred from the instrument of trust; (*b*) to the wishes of the person, if any, empowered to appoint new trustees; (*c*) to the question whether the appointment will promote or impede the execution of the trust; and (*d*) where there are more beneficiaries than one, to the interests of all such beneficiaries.

Compare Act XXVII of 1866, s. 35, *ante*, p. 434; and as to selecting new trustees, see p. 285.

Vesting of trust-property in new trustees.

75. Whenever any new trustee is appointed under section seventy-three or section seventy-four, all the trust-property for the time being vested in the surviving or continuing trustees or trustee, or in the legal representative of any trustee, shall become vested in such new trustee, either solely or jointly with the surviving or continuing trustees or trustee as the case may require.

Powers of new trustees.

Every new trustee so appointed, and every trustee appointed by a Court either before or after the passing of this Act, shall have the same powers, authorities and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the author of the trust.

Compare Act XXVII of 1866, s. 36, *ante*, p. 436.

Survival of trust.

76. On the death or discharge of one of several co-trustees, the trust survives and the trust-property passes to the others, unless the instrument of trust expressly declares otherwise.

See p. 335.

CHAPTER VIII.

Of the Extinction of Trusts.

Trust how extinguished.

77. A trust is extinguished—

(*a*) when its purpose is completely fulfilled; or

(*b*) when its purpose becomes unlawful; or

(*c*) when the fulfilment of its purpose becomes impossible by destruction of the trust-property or otherwise; or

(*d*) when the trust, being revocable, is expressly revoked.

See p. 335.

Revocation of trust.

78. A trust created by will may be revoked at the pleasure of the testator.

A trust otherwise created can be revoked only—

(*a*) where all the beneficiaries are competent to contract—by their consent;

(*b*) where the trust has been declared by a non-testamentary instrument or by word of mouth—in exercise of a power of revocation expressly reserved to the author of the trust; or

(*c*) where the trust is for the payment of the debts of the author of the trust, and has not been communicated to the creditors—at the pleasure of the author of the trust.

Illustration.

A conveys property to *B* in trust to sell the same, and pay out of the proceeds the claim of *A*'s creditors. *A* reserves no power of revocation. If no communication has been made to the creditors, *A* may revoke the trust. But if the creditors are parties to the arrangement, the trust cannot be revoked without their consent.

See pp. 53, 68—76 and 336.

Revocation not to defeat what trustees have duly done.

79. No trust can be revoked by the author of the trust so as to defeat or prejudice what the trustees may have duly done in execution of the trust.

See *Wilding* v. *Richards*, 1 Coll., 655.

CHAPTER IX.

OF CERTAIN OBLIGATIONS IN THE NATURE OF TRUSTS.

Where obligation in nature of trust is created.

80. An obligation in the nature of a trust is created in the following cases.

Where it does not appear that transferror intended to dispose of beneficial interest.

81. Where the owner of property transfers or bequeaths it, and it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferree or legatee must hold such property for the benefit of the owner or his legal representative.

Illustrations.

(*a*.) *A* conveys land to *B* without consideration, and declares no trust of any part. It cannot, consistently with the circumstances under which

* This Chapter deals with implied, resulting, and constructive trusts. As to these, see Lectures III and IV.

APPDX.

the transfer is made, be inferred that *A* intended to transfer the beneficial interest in the land. *B* holds the land for the benefit of *A*.

(*b*.) *A* conveys to *B* two fields, *Y* and *Z*, and declares a trust of *Y*, but says nothing about *Z*. It cannot, consistently with the circumstances under which the transfer is made, be inferred that *A* intended to transfer the beneficial interest in *Z*. *B* holds *Z* for the benefit of *A*.

(*c*.) *A* transfers certain stock belonging to him into the joint names of himself and *B*. It cannot, consistently with the circumstances under which the transfer is made, be inferred that *A* intended to transfer the beneficial interest in the stock during his life. *A* and *B* hold the stock for the benefit of *A* during his life.

(*d*.) *A* makes a gift of certain land to his wife *B*. She takes the beneficial interest in the land free from any trust in favour of *A*, for it may be inferred from the circumstances that the gift was for *B's* benefit.

Transfer to one for consideration paid by another.

82. Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferree, the transferree must hold the property for the benefit of the person paying or providing the consideration.

Nothing in this section shall be deemed to affect the Code of Civil Procedure, section 317, or Act No. XI of 1859 *(to improve the law relating to sales of land for arrears of revenue in the Lower Provinces under the Bengal Presidency)*, section 36.

Trust incapable of execution or executed without exhausting trust-property.

83. Where a trust is incapable of being executed, or where the trust is completely executed without exhausting the trust-property, the trustee, in the absence of a direction to the contrary, must hold the trust-property, or so much thereof as is unexhausted, for the benefit of the author of the trust or his legal representative.

Illustrations.

(*a*.) *A* conveys certain land to *B*—

"upon trust," and no trust is declared; or

"upon trust to be thereafter declared," and no such declaration is ever made; or

upon trusts that are too vague to be executed; or

upon trusts that become incapable of taking effect; or

"in trust for *C*," and *C* renounces his interest under the trust.

In each of these cases *B* holds the land for the benefit of *A*.

(*b*.) *A* transfers Rs. 10,000 in the four per cents to *B*, in trust to pay the interest annually accruing due to *C* for her life. *A* dies. Then *C* dies. *B* holds the fund for the benefit of *A's* legal representative.

(*c*.) *A* conveys land to *B* upon trust to sell it and apply one moiety of the proceeds for certain charitable purposes, and the other for the maintenance of the worship of an idol. *B* sells the land, but the charitable purposes wholly fail, and the maintenance of the worship does not exhaust the second moiety of the proceeds. *B* holds the first moiety and the part unapplied of the second moiety for the benefit of *A* or his legal representative.

(*d*.) *A* bequeaths Rs. 10,000 to *B*, to be laid out in buying land to be conveyed for purposes which either wholly or partially fail to take effect. *B* holds for the benefit of *A*'s legal representative the undisposed of interest in the money or land if purchased.

Transfer for illegal purpose.

84. Where the owner of property transfers it to another for an illegal purpose, and such purpose is not carried into execution, or the transferror is not as guilty as the transferree, or the effect of permitting the transferree to retain the property might be to defeat the provisions of any law, the transferree must hold the property for the benefit of the transferror.

Bequest for illegal purpose.

85. Where a testator bequeaths certain property upon trust, and the purpose of the trust appears on the face of the will to be unlawful, or during the testator's lifetime the legatee agrees with him to apply the property for an unlawful purpose, the legatee must hold the property for the benefit of the testator's legal representative.

Bequest of which revocation is prevented by coercion.

Where property is bequeathed, and the revocation of the bequest is prevented by coercion, the legatee must hold the property for the benefit of the testator's legal representative.

Transfer pursuant to rescindable contract.

86. Where property is transferred in pursuance of a contract which is liable to rescission, or induced by fraud or mistake, the transferree must, on receiving notice to that effect, hold the property for the benefit of the transferror, subject to repayment by the latter of the consideration actually paid.

Debtor becoming creditor's representative.

87. Where a debtor becomes the executor or other legal representative of his creditor, he must hold the debt for the benefit of the persons interested therein.

Advantage gained by fiduciary.

88. Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.

Illustrations.

(*a*) *A*, an executor, buys at an undervalue from *B*, a legatee, his claim under the will. *B* is ignorant of the value of the bequest. *A* must hold for the benefit of *B* the difference between the price and value.

APPDX.

(*b.*) *A*, a trustee, uses the trust-property for the purpose of his own business. *A* holds for the benefit of his beneficiary the profits arising from such user.

(*c.*) *A*, a trustee, retires from his trust in consideration of his successor paying him a sum of money. *A* holds such money for the benefit of his beneficiary.

(*d.*) *A*, a partner, buys land in his own name with funds belonging to the partnership. *A* holds such land for the benefit of the partnership.

(*e.*) *A*, a partner, employed on behalf of himself and his co-partners in negotiating the terms of a lease, clandestinely stipulates with the lessor for payment to himself of a lakh of rupees. *A* holds the lakh for the benefit of the partnership.

(*f.*) *A* and *B* are partners. *A* dies. *B*, instead of winding up the affairs of the partnership, retains all the assets in the business. *B* must account to *A's* legal representative for the profits arising from *A's* share of the capital.

(*g.*) *A*, an agent employed to obtain a lease for *B*, obtains the lease for himself. *A* holds the lease for the benefit of *B*.

(*h.*) *A*, a guardian, buys up for himself incumbrances on his ward *B's* estate at an undervalue. *A* holds for the benefit of *B* the incumbrances so bought, and can only charge him with what he has actually paid.

Advantage gained by exercise of undue influence.

89. Where, by the exercise of undue influence, any advantage is gained in derogation of the interests of another, the person gaining such advantage without consideration, or with notice that such influence has been exercised, must hold the advantage for the benefit of the person whose interests have been so prejudiced.

Advantage gained by qualified owner.

90. Where a tenant-for-life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage.

Illustrations.

(*a.*) *A*, the tenant-for-life of leasehold property, renews the lease in his own name and for his own benefit. *A* holds the renewed lease for the benefit of all those interested in the old lease.

(*b.*) A village belongs to a Hindu family. *A*, one of its members, pays nazrana to Government, and thereby procures his name to be entered as the inámdár of the village. *A* holds the village for the benefit of himself and the other members.

(*c.*) *A* mortgages land to *B*, who enters into possession. *B* allows the Government revenue to fall into arrear with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to *B*. Subject to the repayment of the amount due on the mortgage, and of his expenses properly incurred as mortgagee, *B* holds the land for the benefit of *A*.

91. Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

Property acquired with notice of existing contract.

92. Where a person contracts to buy property to be held on trust for certain beneficiaries, and buys the property accordingly, he must hold the property for their benefit to the extent necessary to give effect to the contract.

Purchase by person contracting to buy property to be held on trust.

93. Where creditors compound the debts due to them, and one of such creditors, by a secret arrangement with the debtor, gains an undue advantage over his co-creditors, he must hold for the benefit of such creditors the advantage so gained.

Advantage secretly gained by one of several compounding creditors.

94. In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.

Constructive trusts in cases not expressly provided for.

Illustrations.

(*a*.) *A*. an executor, distributes the assets of his testator *B* to the legatees without having paid the whole of *B's* debts. The legatees hold for the benefit of *B's* creditors, to the extent necessary to satisfy their just demands, the assets so distributed.

(*b*.) *A* by mistake assumes the character of a trustee for *B*, and under colour of the trust receives certain moneys. *B* may compel him to account for such moneys.

(*c*.) *A* makes a gift of a lakh of rupees to *B*, reserving to himself, with *B's* assent, power to revoke at pleasure the gift as to Rs. 10,000. The gift is void as to Rs. 10,000, and *B* holds that sum for the benefit of *A*.

95. The person holding property in accordance with any of the preceding sections of this chapter must, so far as may be, perform the same duties, and is subject, so far as may be, to the same liabilities and disabilities, as if he were a trustee of the property for the person for whose benefit he holds it:

Obligor's duties, liabilities and disabilities.

Provided that (*a*) where he rightfully cultivates the property or employs it in trade or business, he is entitled to reasonable remuneration for his trouble, skill and loss of time in such cultivation or employment; and (*b*) where he holds the property by

APPDX. virtue of a contract with the person for whose benefit he holds it, or with any one through whom such person claims, he may, without the permission of the Court, buy or become lessee or mortgagee of the property or any part thereof.

Saving of rights of *bonâ fide* purchasers.

96. Nothing contained in this chapter shall impair the rights of transferrees in good faith for consideration, or create an obligation in evasion of any law for the time being in force.

THE SCHEDULE.

STATUTE

Year and chapter.	Short title.	Extent of repeal.
29 Car. II, c. 3	The Statute of Frauds.	Sections 7, 8, 9, 10 and 11.

ACTS OF THE GOVERNOR GENERAL IN COUNCIL.

Number and year.	Short title.	Extent of repeal.
XXVIII of 1866 ...	The Trustees' and Mortgagees' Powers Act, 1866.	Sections 2, 3, 4, 5, 32, 33, 34, 35, 36, & 37. In sections 39 and 43 the word 'trustee' wherever it occurs; and in section 43 the words 'management or' and 'the trust-property or.'
I of 1877 ...	The Specific Relief Act, 1877.	In section 12 the first illustration.

INDEX.

—o—

ABROAD,
c. q t. who is —— must be party to suit, 344.
immoveable property ——, trust of, 32.
moveable property ——, trust of, 26.
payment to *c. q. t.* who is ——, 207.
trustee does not become incapable to act by going, 330.
who is —— not necessary party to suit, 344.
See TRUSTS ACT, 1882.

ABSCOND, security from trustee about to, 182.

ABSENCE
of trustee, Court may make order under Trustee Act in, 441.
beyond jurisdiction, ground for appointment of receiver, 340.
See TRUSTS ACT, 1882.

ABSOLUTE INTEREST in trust estate, when *c. q. t.* entitled to, 271.

ABSOLUTE TRUST for sale does not authorize mortgage, 170.

ABSTRACT of title, conditions of sale as to, 224.

ACCEPTANCE OF TRUST,
by acting as agent, 121.
executor of an executor, 121.
how effected, 220, 467.
liability of trustee after, 123.
parol evidence of, 122.
partial, 122.
recitals, 122.
trustee also executor, 121.
See TRUSTS ACT, 1882.

ACCIDENT, when trustee liable for loss by, 183.

ACCOUNT,
by agent of trustee, 109.
trustee of charity, 364.
c. q. t has right to, 157.
copies of, 158.
costs of inability or refusal to, 158.
destruction of books of, 157.
duty of agent to keep, 157.
trustee to keep, 157.
under Act XX of 1863, 407.
Official Trustee to keep, 411.
effect of negligence in not keeping, 214.
estoppel of *c. q. t.* by settled, 247.
good faith of trustee considered in taking, 158.
inspection of, 158.
liability of managing member of joint Hindu family to, 158.
trustee to —— for rents, 268.
of mesne profits, by trustee renewing lease, 109.
of public funds, no suit lies for, 217.
production of books of, 157.
right of trustee to settlement of, 219.
trustee mixing those of trust-estate with his own, 157.
See TRUSTS ACT, 1882.

ACCUMULATION,
liability of trustee for not following directions for, 184.
of income when applicable for future maintenance, 226.
trust for, 38.
See TRUSTS ACT, 1882.

ACKNOWLEDGMENT of debt by one trustee, 241.

ACQUIESCENCE,
in breach of trust, 190.
accepting portion of claim not, 191.
delay on part of *c. q. t.* when it amounts to, 191.
onus of proof of, 191.
purchase by trustee of trust-property, 261.
sale by benamidar, 103.
manager of joint Hindu family, 307.
in voluntary gifts, 118.
or settlement, 72.
See TRUSTS ACT, 1882.

ACQUISITION by trustee of trust-property wrongfully converted, 313.
See TRUSTS ACT, 1882.

ACTIONS,
duty of trustee to bring and defend, 137.
to restrain waste, 142.

ADMINISTRATION of trust, suit for, 217.

ADMINISTRATOR,
liability of, as to rents, etc., 458.
to pay interest, 313.
may not purchase assets, 265.
petition for advice of High Court by, 459.
when necessary party to suit, 344.

ADMINISTRATOR-GENERAL, remuneration of, 250.
See TRUSTS ACT, 1882.

ADMISSION of receipt of trust-fund by trustee, 338.

ADVANCEMENT,
application of trust-fund for, 227.
evidence to rebut presumption of, 94.

ADVANCES,
interest on, 216.
right of trustee to be reimbursed for, 214.
suit to recover, 216.

ADVERSE TITLE, trustee cannot set up, 155.
See TRUSTS ACT, 1882.

ADVERTISING, duty of trustee for sale as to, 168, 223.

ADVICE,
donor should have independent, 117.
of *c. q. t.* when trustee should apply for, 220.
counsel, *see* COUNSEL.
Court, petition for, 218.
under Religious Societies Act, 463.
Trustees' and Mortgagees' Act, 459.
See TRUSTS ACT, 1882.

ADVOCATE-GENERAL when necessary party to suit relating to charity, 363.

AFFIDAVITS,
not to be used on petition for advice of Court, 219.
of fitness of new trustee, 331.

AGENT,
acceptance of trust by acting as, 121.
authority from *c. q. t.* to pay trust-money to, 179.
becoming trustee may not profit. 254.
duty of—— to keep accounts, 157.
has no lien for expenses. 215.
liability of trustee for acts of, 140, 184, 235.
may not purchase trust-estate. 260.
not entitled to receive purchase-money, 229.
notice of equitable assignment to, 280.
payment to, 240.
remuneration of, 243, 249.
right of trustee to be remunerated for expenses of, 212.
reimbursed for damages caused by, 215.
to whom liable, 240.
trustee disclaiming may act as, 134.
when considered constructive trustee, 107, 109, 184.
when responsible for loss, 184.
See TRUSTS ACT, 1882.

AJMERE, Minors' Act in, 228.

ALIEN,
creation of trust by, 126.
may be *c. q. t.*, 127.
trustee. 129.
See TRUSTS ACT, 1882.

ALIENATION,
by benamidar, 103.
by c. q. t. of equitable interest, 273.
assignee takes subject to all equities, 274.
conveyance how made, 274.
description of property, 278.
equities, assignee takes subject to all, 274.
incumbrances, inquiries as to, 273.
married woman cannot alienate property settled to separate use, 274.
mortgage, may be by way of, 277.
notice of equitable title, 273.
to trustees to be given, 276.
what is sufficient, 279.
See NOTICE.
priorities. 276, 281
set-off, assignee takes subject to rights of, 274.
stop order, 281.
suit by purchaser for conveyance, 273.
trustee cannot interfere, 273.
liability of. for loss after notice, 273.
by Hindu widow, 147.
of charity estates, 367.
property devoted to idol, 374.
wuqf property, 385—7.
restriction on, 37, 40.

ALLOWANCE,
to partner for carrying on business, 243.
trustees, 243.
for outlay when ordered to reconvey, 290.
See REMUNERATION.

ALMSHOUSE, trust for, 353.

ALTAMGHA, effect of use of word, 383.

ALTERING SCHEME OF CHARITY, 358.

APPEAL,
from order on petition for advice, 218.
is at trustee's risk, 217.

APPLICATION OF PURCHASE-MONEY,
liability of purchaser to see to, 228.
agent, payment to, will not discharge, 229.
charge of debts releases liability, 230.
in case of purchaser from Hindu devisee, 232.
notice of breach of trust, effect of, 231.
on purchase under power of sale, 171.
solicitor, payment to, will not discharge, 229.
to whom purchase-money should be paid, 229.
under Fines and Recoveries Act, 229.
Trustees' and Mortgagees' Powers Act, 229, 446, 453.

APPOINTMENT OF NEW TRUSTEE,
by Court, 330.
affidavits of fitness, 331.
costs of suit for, 332.
discharge of representatives of deceased trustee, 333.
executor, discharge of, 333.
grounds for appointment, 331, 333.
Official Trustee when appointed, 332, 409.
rules for selection of new trustees, 285.
suit necessary, 284, 331.
Trustees' and Mortgagees' Powers Act, 333, 454.
where property lost, 332.
whether retiring trustee must appoint successor, 331.
See TRUSTS ACT, 1882.
of charity, 363, 365.
under powers in instrument, 327.
abroad, trustee does not become incapable to act by going, 330.
becoming 'unfit' or 'incapable to act,' 329.
breach of trust, when retiring trustee liable for, 330.
c. q. t. may be appointed, 329.
'declining to act,' 328.
effect of assignment by executors on, 123.
exercise of power of, 329.
for purpose of committing breach of trust, 330.
jurisdiction, new trustee must be in, 330.
number of trustees, 328.
payment into Court on retiring, 328.
'refusing to act,' what is, 328.
retire, payment to trustee to, 330.
'retiring from trust,' what is, 328.
to aid in distributing trust-fund, 176.
trustee dying in lifetime of settlor, 328.
stamp on transfer, 330.
See NEW TRUSTEES; TRUSTS ACT, 1882.

APPOINTMENT OF NEW TRUSTEE—(*continued*).
under Religious Endowments Act, 399.
Religious Societies Act, 461.
Trustees' and Mortgagees' Powers Act, 454.
See TRUSTS ACT, 1882.

APPOINTMENT OF RECEIVER, 339.
discharge of, 341.
duty of, to keep accounts, 157.
grounds for: bankruptcy, drunkenness, insolvency, misapplication of assets, 340.
poverty not, 340.
liability of, to pay interest, 313.
remuneration of, 243.
sureties required on, 340.
under Trustees' and Mortgagees' Powers Act, 447.
who may apply for, 340.
where waste, 147.

APPORTIONMENT
of fund between legatees and charities, 360.
profits of trust-property employed in trust, 317.

APPROPRIATION OF LEGACY, when trustee may take steps for, 220.

ARREST of trustee about to abscond, 182.

ASSAM, Minors' Act in, 228.

ASSENT to creditor's deed, 75.

ASSETS,
acceptance of trust by interfering with, 121.
distribution of, 459.
time for realizing, 173.

ASSIGNEE,
of equitable interest takes subject to all equities, 274, 324.
insolvent neglecting to pay dividends liable to pay interest, 166, 313.
reversionary heir cannot sue to restrain Hindu widow from committing waste, 148.
trustee cannot appoint new trustee under power, 329.
purchase of insolvent's estate by, 264.

ASSIGNMENT,
by executors on appointment of new trustees, effect of, 123.
for purpose of defrauding creditors, 60.
of *chose-in-action* subject to trust, 58.
equitable interest, 56.
See ALIENATION.
half-pay, 35.
renewed lease, 109.

ATTORNEY,
delegation of ministerial acts to, 240.
See TRUSTS ACT, 1882.
employment of, to invest, 236.
setting aside gift to, by client, 114.
See PARTNER; REMUNERATION; SOLICITOR.
when constructive trustee, 110.
See SOLICITOR.

BENGAL SECRETARIAT LIBRARY.

AUCTION, when trustee may sell by, 222, 444.
See TRUSTS ACT, 1882.

AUCTIONEER,
if trustee, may not profit from office, 255.
remuneration of, if mortgagee, 243.

AUTHOR OF TRUST,
definition of, 18.
in Trust Act, 465.
delegation authorized by, 238.
remuneration of trustee may be fixed by, 247.
who may be, 124.

AUTHORITY from *c. q. t.* to pay trust-money to agent, 179.

AUTHORITY OF TRUSTEE generally, 219.
to appropriate legacy, 220.
buy in at sale 224.
compound debts, 222.
cut decaying timber, 220.
exercise discretionary powers of *bonâ fide* proprietor, 219.
insure, 221.
maintain *c. q. t.* though adult, 221.
infant *c. q. t.*, 226.
pay barred debt, 222.
release debt, 222.
repair, 221.
sell by private contract or public auction, 222.
vary investments, 225.

BADGES OF FRAUD, 117.

BAILIFF, right of trustee to be reimbursed expenses of, 212.

BANKER,
deposit of moveable property, securities, or money with, 140.
liability of trustee for failure of, 140, 142.
note-of-hand of, not a sufficient security, 142.

BANKRUPTCY,
of trustee ground for appointment of receiver, 340.
trust to cease on —— of *c. q. t.*, 41-45.
See INSOLVENCY.

BARRED DEBT, when trustee may pay, 222.

BARRISTER when a constructive trustee, 110.

BATHING GHAT, trust for, 14.

BECOMING UNFIT OR INCAPABLE TO ACT,' what is, 329.

BENAMI TRANSACTIONS, 97.
assent of benamidar to, unnecessary, 100.
burden of proof of, 98.
disputing landlord's title, 100.
equitable owner may sue benamidar, 104.
evidence to prove, 101-2.
fraud, true owner may plead his, 105.
Mahomedans, benami transactions among, 100.
notice, purchase with, from benamidar, 104.
oral evidence to prove, 102.
pleading, 102.
purchase at sale for arrears of revenue, 103.
with notice of, 104.

BENAMI TRANSACTIONS—(*continued*).
real owner may sue benamidar, 104.
sale by benamidar, 103.
son, purchase in name of, 98.
standing by, 103.
stranger, purchase in name of, 98.
strict proof of benami title required, 101.
transaction avowedly fraudulent, 105.

BENEFICIARIES, *see* CESTUI QUE TRUST; TRUSTS ACT, 1882.

BEQUEST to religious or charitable purposes, provisions of Succession Act as to, 352.

BEST ADVANTAGE, duty of trustee to sell to, 233.

BIBLES, trust for purchase of, 353.

BID, when trustee allowed to, for trust-estate, 264

BILLS OF EXCHANGE, following trust-property converted into, 296.

BOMBAY, Minors' Act in, 228.

BOND OF INDEMNITY, when trustee entitled to, 178.

BOOKS OF ACCOUNT, production of, 157.

BREACH OF TRUST,
abscond, trustee who has committed a —— and is about to abscond may be required to give security, 182.
accumulate dividends, neglect to, is a, 184.
acquiescence in by *c. q. t.*, 190.
agent, liability of, for, 140, 184.
appointment of trustee for purpose of committing, 330.
by co-executor, 193, 201, 206.
co-trustee, 140, 193.
c. q. t., acquiescence in, by, 190.
concurrence in, 188.
joining in —— liability of, 322, 323.
personal liability of, to reimburse trustee, 216.
purchase of trust-estate from, 261.
release by, from, 192.
compounding debts, when a, 252.
concurrence in, 188.
confirmation of, 192.
contribution among co-trustees in respect of, 207.
costs of suit in respect of, *see* COSTS.
criminal, 182, 406.
delay in seeking relief for, 191.
destruction of trust-property, liability of trustee for, where, 140.
extent of liability for, 182.
following trust-estate, 191.
giving up custody of title-deeds is, 211
imaginary values, where trustee charged with, 182.
impounding fund in Court to meet liability for, 207.
indemnity-clause how far protection for, 201.
indemnity from gainer by, 217.
injunction to restrain, 206, 287.
insure, when neglect to, is, 140.
investment, neglecting, is, 314.
on personal security is, 142, 160
lease, taking lease of trust-property by trustee is, 260.

BREACH OF TRUST—(*continued*).
leaving trust-estate outstanding is, 137, 138.
liability of agent party to, 240.
partner employing trust-funds in business, 319.
trustee delegating office, 235.
employing trust-funds in trade, 314.
leaving property uninvested, 314.
limitation to suits in respect of, *see* LIMITATION.
loan by trustees to themselves is, 265.
loss by accident, where, 183.
mixing trust-funds with trustee's money is, 140, 142.
neglect to accumulate dividends is, 184.
get in trust-estate, 137.
invest, 160.
obey directions in instrument of trust, 184.
pay premiums, 184.
register, 184.
transfer stock, 184.
new trustee, liability of, for —— of predecessor, 136.
non-investment is, 314.
note-of-hand, investment on, is, 161.
notice of, 231
See NOTICE.
parting with control of trust-property is, 141.
partner, liability of, for, 183.
payment to legatees while debts unpaid, 181.
under power of attorney when, 207.
personal liability of trustee for, 137.
though no benefit derived from, 182.
personal security, lending on, is, 138, 142, 160, 265.
policy of assurance, neglect to keep up, when, 184.
power, neglect to execute is, 184.
predecessor, liability of trustee for —— of, 193.
professional adviser, liability of, for, 183.
promissory note, investment on, is, 160.
purchase by trustee for sale of trust-property, when, 256.
of debt when, 252.
insolvent's estate by assignee, 264.
trust-estate from *c. q. t.*, 261.
purchaser, following trust estate into hands of, 291.
from heirs of Mahomedan debtor, 312.
receipt, trustee or executor joining in for conformity, liability of, for, 194, 199.
release by *c. q. t.* from liability for, 192.
representatives of deceased trustee, liability of, for his, 330.
sale, purchase by trustee for sale of trust-estate is, 256.
securities, neglect to realize when a, 137.
set-off in respect of —— not allowed, 192.
several liability of trustees for, 206.
solicitor, liability of, for —— of partner, 183.
stock, neglect to transfer, when, 184.
trade, employing trust-funds in, when, 251, 314.
wilful default, when trustee charged with —— in respect of, 182, 187.
See TRUSTS ACT, 1882.

BRIDGE, trust for repairs of, 352.

BROKER,
if trustee, may not profit from office, 255.
liability of trustee for failure of, 141, 142.

BURDEN OF PROOF in benami transactions, 98, 101.

BURMA, Minors' Act in, 228.

BUYING-IN AT SALE, 224.
See TRUSTS ACT, 1882.

CAPRICE, liability of trustee refusing to transfer through, to pay costs, 119.

CARE required from trustee, 140.
See TRUSTS ACT, 1882.

CASES FOR OPINION OF COUNSEL, right of *c. q. t.* to, 212.

CENTRAL PROVINCES, Minors' Act in, 228.

CERTAIN,
gift to idol must be, 370.
implied trust must be, 79.
so trust for charitable or religious purposes, 355.
See TRUSTS ACT, 1882.

CESTUI QUE TRUST,
abroad, payment of trust-fund to, 207.
should be party to suit, 344.
acquiescence by, in breach of trust, 190.
See ACQUIESCENCE.
and trustee, parties to suit between, 343.
assignment of equitable interest of, 56.
See ALIENATION.
authority from, to pay trust-money to agent, 179.
concurrence by, in breach of trust, 188.
consent of, to change of investment, 162.
contract for remuneration with, 248
conveyance of trust-property to, 175.
definition of, 18, 465.
discharge of trustee from office by, 235, 327.
election by, to take trust-property unconverted, 320.
estoppel of, by settled account, 247.
failure of, 157.
heirs or next-of-kin of, 256.
gift by —— to trustee, 252.
interest of each —— to be attended to on sale, 169.
joining in breach of trust, liability of, 322.
liability to refund, if overpaid, 180
maintenance of adult, 221.
infant, 226.
may be trustee, 132, 329.
set aside purchase of trust-estate by trustee, 259.
one, not to be benefited at expense of another, 152, 162.
payment of trust-fund after death of, 176.
to, without notice of transfer, 208.
when abroad, 207.
personal liability of, to reimburse trustee, 216.
purchase for benefit of, 252.
of trust-estate from, by trustee, when breach of trust, 261.
release to trustee from, 177.
remedy of, in cases of non-investment and wrongful investment, 167.
in case of trustee's insolvency, 168.
and *see* BREACH OF TRUST; DUTIES AND LIABILITIES OF TRUSTEES; SUIT.

CESTUI QUE TRUST—(continued).
right of, to account of rents and profits, 268.
alienate interest, 273.
See ALIENATION.
apply for appointment of proper number of trustees, 280.
of receiver, 340.
call for conveyance, 269.
compel performance of act of duty, 287.
copies of documents, 272.
costs of suit to compel conveyance, 269.
elect to take property unconverted, 320.
execution of trust, 282.
have fund paid into Court, 336.
hold property absolutely, 271.
injunction to restrain breach of trust, 287.
inspection of documents, 272.
institute suit for appointment of new trustees, 284.
to compel conveyance, 269.
proper number of trustees, 284.
rents and profits, 268.
set aside purchase of trust-property by trustee, 289.
specific performance of trust, 271.
suit by trustee against, to recover advance, 216.
to be pointed out on creation of trust, 52.
transferree from, rights of, 324.
when necessary party to suit, 341, 344.
trustee should apply for advice of, 220.
who may be, 127, 467.
See TRUSTS ACT, 1882.

CHANGE OF INVESTMENT, consent of *c. q. t.* to, 162.

CHARGE OF DEBTS, liability of purchaser to see to application of purchase-money where there is a, 230.

CHARGES AND EXPENSES when allowed to trustee, 347.

CHARITABLE PURPOSES,
registration of societies for, 391.
See REGISTRATION OF SOCIETIES ACT.
when Official Trustee may be appointed trustee of trust for, 409.

CHARITABLE TRUSTS, 349.
account, trustees of, must, 364.
Advocate-General when a necessary party to suit respecting, 363.
alienation of property devoted for, 369.
altering scheme of, 358.
among Hindus, 369.
Mahomedans, 380.
appointment of new trustees of, 365.
apportionment of fund given for, 360.
breach of trust, 362.
certain, gift for, must be, 355.
Civil Procedure Code, provisions of, as to, 363.
construction of will containing, 357.
contemporaneous usage, when evidence of, admissible to aid in construing will, 357.
controlling revenues of property devoted to, 367.
cy près, doctrine of, 357.
establishment of, 350.
evidence to explain will containing, 357.
failure of, 358.

CHARITABLE TRUSTS—(*continued*).
foreign country, gift for —— in, 362.
gift for —— must be public and certain, 354, 355.
generally, effect of, 358.
immoveable property, —— may be created, 352.
intention of testator to give to —— when carried out *cy près*, 359.
limitation of suit for account of, 364.
Mortmain Act not applicable in India, 351.
new trustees, appointment of, 365.
Official Trustee when appointed trustee of, 366.
parties to suits respecting, 363.
principles of construing will containing, 357.
procedure in suit for breach of, 363.
purchaser without notice from purchaser with notice of, 368.
redress for breach of —— how obtained, 363.
scheme of, power of Court to alter, 358.
Succession Act, provisions of, as to creation of, 352.
suits respecting, 363.
superstitious trusts, 350.
trustees of, account from, 364.
uncertainty, when gift to——void for, 355.
vesting property in new trustees, 366, 367.
visitors, 367.
what are, 352, 354.
wills, construction of, 357.
See TRUSTEE ACT; TRUSTS ACT, 1882.

CHATTELS, trustee of, should make inventory, 137.

CHILD.
gift by, to parent, 112.
no resulting trust on purchase in name of, 90.

CHILD AND STRANGER, resulting trust on purchase in names of, 94.

CHOSE-IN-ACTION,
alienation of, 273.
assignment of, subject to trust, 58.

CHURCH, trust for, 352.

CIVIL PROCEDURE CODE,
chap. xxxiv, p. 182.
ss. 15, 16, p. 26.
ss. 26, 27, and 28, p. 341.
ss. 30, 438, and 439, p. 345.
s. 317, p. 102.
s. 437, p. 342.
ss. 437, 439, and 539, p. 15.
s. 539, p. 563.

CLASS OF PERSONS, charitable trust for, 354.

CLIENT AND LEGAL ADVISER, setting aside transactions between, 114.

CO-EXECUTOR,
delegation of office to, 236.
liability of one for breach of trust of his ——, 193, 201.

COLONIES, trust of land in, 29–31.

COLOURABLE GIFT TO IDOL, 370.

COMMITTEE,
appointment of, under Act XX of 1863, p. 390.
of lunatic, remuneration of, 243.

COMMON ACCOUNT, liability of trustee under decree for, 204.

COMMUNICATION of deed to creditor, 76.

COMPANY,
investment on stock or shares of, 161.
trust for a private —— in perpetuity, void, 335.

COMPENSATION, conditions of sale as to, 224.

COMPOUNDING DEBTS,
liability of executors and trustees for, 252.
powers of, 222.
under Trustees' and Mortgagees' Powers Act, 457.
See TRUSTS ACT, 1882.

COMPOUND INTEREST,
liability of executor or administrator to pay, 313.
trustee, 166, 318.
See TRUSTS ACT, 1882.

COMPULSORY PAYMENT into Court, 336.

CONCURRENCE IN BREACH OF TRUST, 188.
See TRUSTS ACT, 1882.

CONDITIONS OF SALE,
what are allowable on sale by trustees, 223.
under Trustees' and Mortgagees' Powers Act, 444.
See TRUSTS ACT, 1882.

CONDUCT, disclaimer by, 133.

CONFIDENCE IN TRUSTEE, 16.

CONFIRMATION
in case of voluntary gift, 118.
of breach of trust, 192.
purchase of trust-property by trustee, 261.

CONFORMITY, executors and trustees joining in receipt for, 194—199.
See TRUSTS ACT, 1882.

CONSENT
of *c. q. t.* to change of investment, 162
Court to investment, 163.
See TRUSTS ACT, 1882.

CONSIDERATION,
evidence to prove, 70.
fictitious — is badge of fraud, 117.
not necessary to valid declaration of trust, 52.
trustee retiring for, 255.
what is a valuable, 59.
See TRUSTS, ACT, 1882.

CONSTRUCTIVE NOTICE, 104, 293.

CONSTRUCTIVE TRUST,
acquiescence, 118.
laches, 119.
limitation, 365.
persons gaining benefit from fiduciary relation, hold property on, 107.
agent, 107.
factors, 107.
guardian, 113.
legal advisers, 109, 114.

CONSTRUCTIVE TRUST—(*continued*).
medical advisers, 111, 115.
parent, 112.
partner, 107.
spiritual advisers, 111.
trustee, 107.
setting aside gifts, 115.
See TRUSTS ACT, 1882.

CONTINGENT RIGHT, *see* TRUSTEE ACT, 416.

CONTINUING LIABILITY of old trustee, 437.

CONTRACT,
every person competent to, may create trust, 124, 467.
See TRUSTS ACT, 1882.
for remuneration with *c. q. t.*, 248.
trust founded on an illegal, 35.
when trustees may sell by, 222, 444.

CONTRACT ACT,
s. 23, p. 33.
ss. 57, 58, p 49.
s. 157, p. 319.

CONTRACT OF SALE, conditions as to, 224.

CONTRIBUTION, 206.
See TRUSTS ACT, 1882.

CONTROL OF TRUST FUND, duties of trustees as to, 141.

CONVERSION, 320.
of perishable property, 148.
See TRUSTS ACT 1882.

CONVERTED TRUST PROPERTY, following, 294.

CONVEY,
power of High Court to appoint person to, 425.
trustees to. 225
See TRUSTS ACT, 1882.

CONVEYANCE
all trustees must join in, 240.
by trustee exercising power of sale. 445.
of equitable interest how made. 274.
trust-property to *c. q. t.*, 175.
right of *c. q. t.* to call for, 269.
to new trustees. 334.
without consideration, resulting trust on, 90.

COPIES
of accounts, right to, 158.
documents, right of *c. q. t.* to, 272.
See TRUSTS ACT, 1882.

CORPORATION
may create trust, 124.
may be *c. q. t.*, 127.
trustee, 130.

CORPUS,
lien of trustee on, for expenses, 215.

COSTS,
after decree, 347.
between stranger and parties to trust, 346.
trustees and *c. q. t.*, 346.
caused by trustee's misconduct, 348.
charges and expenses, 347.
in suit for breach of trust where several defendants involved, 207.
of accounts, 348.
application to High Court under Religious Societies Act, 463.
appeal, 217.
counsel's opinion on title, 170.
disclaimer, 347.
determining question of law, 348.
relating to trustee's private interests, 348.
inability or refusal to account, 158.
independent action by trustees, 241.
legal advice on purchase by trustee, 171.
petition under Trustee Act, 441.
refusing to convey trust-estate, 269.
setting aside voluntary gift, 119.
severing defence, 345--6.
solicitor, trustee acting for himself, 246.
suit against Official Trustee, 411.
for appointment of new trustee, 332.
necessary by act of trustee, 347.
to assert title to trust-fund, 178.
discharge trustee, 332.
remove trustee, 285.
set aside sale to trustee, 291.
trustee after disclaimer, 133.
not making inventory of chattels, 137.
out of fund, 347.
reimbursement of trustees for, 213.
under Act XX of 1868, p. 404.
See TRUSTS ACT, 1882.

CO-TRUSTEES
delegation of office to, 236.
disclaimer by, 133
joint nature of office of, 240
liability of trustee for improper accounts of, 157.
loss caused by, 140.
several liability of, 206.
when one trustee liable for breach of trust of his ——, 193.
See TRUSTS ACT, 1882.

COUNSEL,
costs of opinion on title, 170.
right of *c. q. t.* to cases for opinion of, 212.
when trustee entitled to take opinion of, 134.

COURT,
alteration of scheme of charity by, 358.
appointment of new trustees by ——, *see* APPOINTMENT OF NEW TRUSTEES.
consent of, to investment, 163.
decree of, indemnity to trustee, 217.
discharge of trustee by, 330.
affidavit of fitness of new truste on, 331.
caprice, trustee cannot throw up trust from, 331.
conveyance to new trustee on, 334.

COURT—(*continued*).
discharge—
costs of, 332.
grounds of, 331—3.
of representatives of deceased trustee, 333.
suit necessary, 331.
under Trustees' and Mortgages' Powers Act, 333.
where property lost, 332.
whether retiring trustee must appoint successor, 331.
disclaimer in, 133.
execution of trust by, 282.
impounding trust-fund in, 207.
leave of, when required for sale or mortgage, 168.
purchase, 171.
payment into, on retirement, 328.
generally, 338.
out of, to single trustee, 180.
petition for advice of, 218.
See PETITION.
remuneration of trustee appointed by, 246.
See TRUSTS ACT, 1882.

COVENANTS, usual on sale by trustees, 224.

CREATION OF TRUST, 51.
See DECLARATION OF TRUST; TRUSTS ACT, 1882

CREDITORS,
benami transaction to defraud, 105.
purchase by, of insolvent's estate, 264.
void as against, 92.
suit by, against benamidar, 105.
trusts for, 14.
voluntary settlement for purpose of defrauding, 59.

CREDITORS' DEED,
communication of, 76.
execution of, 75.
revocation of, 73.

CRIMINAL BREACH OF TRUST, 182.
of property of religious endowment, 406.

CURATOR, remuneration of, 249.
See TRUSTS ACT, 1882.

CUSTODY OF TITLE-DEEDS, right of trustee to, 211, 272.
See TRUSTS ACT, 1882.

CY PRÈS,
doctrine of, 23.
in case of charity, 357—361.

DEATH—
gift in expectation of, when set aside, 115.
of *c. q. t.*, payment after, 176.
presumption of, 176
vacation of office of trustee by, 488.

DEBT,
barred, when executor or administrator may pay, 222.
compounding and releasing, 222.
See TRUSTS ACT, 1882.
due to trust-estate, duty of trustee as to, 137.

DEBT—(*continued*).
liability of purchaser to see to application of purchase-money in payment of, 230.
payment of, by instalments, 138.
trust for payment of, 76.

DEBUTTUR PROPERTY,
alienation of, 374.
by lease, 374.
estate which may be created on, 374.
evidence of endowment to be given, 375.
sale of, how far set aside, 375.
necessity for, to be proved, 374.
turn of worship, 376.
trustee may not profit by, 375.

DECLARATION OF TRUST, 51.
by *c. q. t.* of equitable interest, 56.
consideration for —— not necessary, 53.
incomplete, not enforced against author of trust, 53.
intention to create trust must be shown, 52.
may be by deed or will, 51.
must be complete, 53.
of immoveable property, 52, 466.
moveable property, 51, 466
property passing by delivery, 54.
parol, 52.
Statute of Frauds how far in force in India, 52.
transmutation of possession not necessary, 53.
valuable consideration, effect of, 52.
when complete, 56, 57, 465.
writing when necessary, 52.
See TRUSTS ACT, 1882; VOLUNTARY SETTLEMENTS.

DECLARATION of election to take property unconverted, 321.

DECLINING TO ACT,' what is, 328.

DECREE,
of Court, indemnity to trustee, 217.
payment of trust-fund into Court after, 338.
primâ facie proof of necessity for sale, 311.
suspension of trustees' power after, 232.
See TRUSTS ACT, 1882.

DEED,
implied trust in, 77.
for benefit of creditors, 74, 76.

DEFAULT, wilful, must be pleaded, 187.

DEFENDING ACTION, duty of trustee as to, 137.
See TRUSTS ACT, 1882.

DEFRAUDING CREDITORS
by benami transaction, 105.
voluntary settlement for purpose of, 59.

DELAY
in applying to set aside voluntary gift, 119.
disclaiming trust, 133.
proceeding against trustee for breach of trust, 191.
realizing trust-property, 174.
re-selling, 225.

DELEGATION OF TRUST, 235.
authorized by settlor, 238.
breach of trust, liability of trustee for, 235
employment of solicitor to invest, 236.
for sale, 222.
fraud by co-trustee, 239.
legal and moral necessity for, 237.
of discretionary nature, 239.
ministerial act, 240.
to agent, 240.
broker, 236.
co-executor or co-trustee, 236.
trustee, 236.
when necessary, 236.
See TRUSTS ACT, 1882.

DELIVERY OF TITLE-DEEDS, trust for, 212.

DEPOSIT, conditions of sale as to return of, 224.

DEPRECIATORY CONDITIONS OF SALE, trustee should not employ, 223.

DERIVATIVE TITLE, 176.

DESTRUCTION
of books of account, liability of trustee for, 157.
trust-property, liability of trustee for, 140.

DETERIORATION OF TRUST-PROPERTY when breach of trust, 140.

DEVISE subject to trust for idol, 373.

DEVISEE of trustee cannot appoint new trustee under power, 329.

DILIGENCE, duty of trustee to use, 168.

DIRECTOR,
may not profit from office, 254.
See TRUSTS ACT, 1882.
remuneration of, when partner solicitor, 246.

DISABILITIES OF TRUSTEES, 234.
See TRUSTS ACT, 1882.

DISABILITY, payment of trust-fund to persons under, 180.

DISCHARGE,
by payment to agent, 240.
how trustee may obtain, 235, 327, 330.
See TRUSTS ACT, 1882.
of person paying purchase-money, 446.
receiver, 341.
representatives of deceased trustee, 333.
trustee's receipt when, 456.

DISCLAIMER OF TRUST, 132, 467.
acquiescence when a bar, 134.
acts of ownership, trustee may not disclaim after exercising, 132.
by heir of trustee, 132.
one trustee not ground for appointment of receiver, 341.
parol, 133.
renunciation of probate, 122.
written statement, 133.
counsel's opinion as to, when trustee may take, 134.
delay when a bar, 133.

DISCLAIMER OF TRUST—(*continued*).
how made, 133.
in Court, 133.
when trustee may disclaim and accept gift, 133.
See TRUSTS ACT, 1882.

DISCLAIMING TRUSTEE,
costs of, 347.
not necessary party to suit, 344.

DISCLOSING TRUST on purchase from trustees, 171

DISCRETION
of trustees as to selling trust-property, 173.
not generally interfered with, 152, 155.
when Court will interfere with, 242.
See TRUSTS ACT, 1882.

DISCRETIONARY TRUST, 18.
delegation of, not permitted, 239.
for sale cannot be exercised by infant, 127.
See TRUSTS ACT, 1882.

DISPUTING LANDLORD'S TITLE, 100.

DISSENTERS, trust for, 353.

DISSOLUTION OF SOCIETIES,
registered under Act XVI of 1860, p. 394.
under Religious Societies Act, 463.

DISTRIBUTION
of trust-fund, 175.
under Trustees' and Mortgagees' Powers Act, 459.

DOCUMENTS, right of *c. q. t.* to inspection of, 272.

DOUBTFUL EQUITY, purchaser taking with, 294.

DUTIES OF TRUSTEES,
acceptance of office, consequent on, 135.
accounts, as to, 157.
See ACCOUNT.
active, in execution of trust to be, 135.
acquaint themselves with state of trust, 136.
advantage, trustee may not derive, from trust, *see* PROFIT.
attend to interests of all parties, 169.
care required from trustees, 140.
charities, *see* CHARITABLE TRUSTS.
collect debts due to estate, 137.
control of trust-funds, 141.
conversion of perishable property, 148.
convey, *see* CONVEYANCE.
custody of moveable property, 140.
debts, *see* DEBTS.
delegate, trustees may not, *see* DELEGATION.
distribute trust-fund, 175.
get in trust-estate, 136, 137, 140.
impartial, to be, 152.
insure, when trustee may, 221.
investments, as to, 159.
outstanding property, getting in, 136, 137, 140.
protect trust-estate, 137.
purchase, 171.

DUTIES OF TRUSTEES—(*continued*).
realize securities, time to, 139.
sale, *see* SALE.
title, to make good, to trust-property on sale, 170.
trustees may be compelled to perform act of duty, 271, 287.
varying securities, as to, 162.
waste, to prevent, 142.
See MANAGER OF JOINT HINDU FAMILY; TRUSTS ACT, 1882; WASTE.

EARMARK, meaning of, as applied to money, 295.

EDUCATION, trust for, 352. 354.
See TRUSTS ACT, 1882.

ELECTION
by *c. q. t.* as to remedy when trust-property lost, 165.
where trust-property to be sold or invested, 320.
one *c. q. t.* to retain share unconverted, 320.

ENDOWMENT
of land subject to mortgage, 384.
under Act XX of 1863, p. 396.
See RELIGIOUS TRUSTS.

ENFORCING VOLUNTARY SETTLEMENT, 72.

ENJOYMENT OF PROPERTY, trust postponing, 37.

EQUITABLE ESTATE, 8.

EQUITABLE INTEREST, assignment of, 56.
See ALIENATION; ASSIGNMENT.

EQUITABLE OWNER, proof of benami title by, 105.

EQUITABLE WASTE, 145.

EQUITIES, assignee takes subject to, 274, 324.

ESSENCE OF CONTRACT, conditions as to time being of the, 224.

ESTATES OF FREEHOLD, 2.

ESTOPPEL
in benami transaction, 100.
of *c. q. t.* by settled account, 247.

EVIDENCE,
of acceptance of trust, 122.
appropriation, 382
benami transactions, 107.
election to take property unconverted, 321.
endowment, 375.
necessity for sale, 311.
to contradict recitals in deeds, 122.
prove consideration, 70.
rebut presumption of advancement, 94.
resulting trust, 88, 94.

EVIDENCE ACT,
s. 111, p. 111.
s. 116, p. 100.

EXECUTED TRUSTS, 20.

EXECUTION,
of creditor's deed, 75.
powers under Trustees' and Mortgagees' Powers Act. 151.
trust, discretion as to mode of, not interfered with, 155.
for idol, 380.
right of *c. q. t.* to. 271.
See TRUSTS ACT, 1882.
suit for, 282.
trustees to be impartial in, 152.

EXECUTION-SALE, liability of purchaser to see to necessity, 311.

EXECUTOR,
also trustee, acceptance of trust by, 120.
compounding debts, liability of, 252.
discharge of, 338.
disclaiming may act as agent, 134.
duty of, to account, 157.
employing trust-fund in trade, 251.
gift to, disclaimer of office of, 133.
joining in receipt for conformity. 199.
liability of, to pay interest. 166, 313.
may compound debts, 222, 457.
keep ready-money for winding up estate, 142.
not purchase assets, 265.
petition for advice of High Court by, 459.
proof in insolvency by, 240.
release to, 177.
retirement of, 235.
time for realizing assets, 173.
when necessary party to suit. 344.
when one liable for breach of trust of another, 193, 201.
See TRUSTS ACT, 1882.

EXECUTOR *DE SON TORT*,
constructive trust on renewal of lease by, 107.

EXECUTOR OF AN EXECUTOR, 121.

EXECUTORY TRUSTS, 20.
cy près, application of doctrine of, to, 23.
in marriage articles, 22.
wills, 23.
intention of settlor carried out, 24.

EXPENSES.
lien of trustee for, 215.
agent has no lien for, 215.
right of trustee to be reimbursed for, 212.
See TRUSTS ACT, 1882.

EXPRESS TRUST, no limitation in case of, 303.

EXTINCTION OF TRUST, 335
See TRUSTS ACT, 1882.

FACTOR when considered a constructive trustee, 107.

FAILURE,
of *c. q. t.*, 157.
charitable trust, 359.
heirs of *c. q. t.*, 256.
next-of-kin, 256.
trust, 48.

FAMILY RELIGIOUS TRUST, 14.

FATHER, maintenance of infant *c. q. t.* by, 226.

FEE-SIMPLE, estates in, 3.

FEES TO COUNSEL, right of trustee to be reimbursed, 212.

FELON, creation of trust by, 126.

FEMALE
may be mutawalli, 388.
trustee of idol, 376.

FEUDAL SYSTEM, 2.

FICTITIOUS CONSIDERATION is badge of fraud, 117.

FICTITIOUS CONVEYANCE, trust founded on, 35.

FIDUCIARY RELATIONSHIP,
jurisdiction of Courts to set aside gifts to persons standing in —— to donor, 111.
resulting trust, 92.
See TRUSTS ACT, 1882.

FINES AND RECOVERIES ACT, 229.

FITNESS OF NEW TRUSTEE, affidavit of, 331.

FOLLOWING
converted trust-property into hands of third person, 294.
See TRUSTS ACT, 1882.
estate of Mahomedan debtor, 312.
trust-property into hands of purchaser for value, 291.
from manager of joint Hindu family, 306.

FORECLOSURE, suits for, of land beyond jurisdiction, 28.

FOREIGN COUNTRY,
gift to charity in, 362
investment in securities of, 161.
trust of land in, 29, 49.

FORFEITED PROPERTY, trust cannot be created of, 126.

FORFEITURE, clause of, strictly construed, 46.

FRAUD,
by co trustee, exoneration of trustee from loss caused by, 239,
defective title cannot be strengthened by, 294.
effect of, in computing period of limitation, 302.
obtaining concurrence of *c. q. t.* in breach of trust by, 190.
setting aside voluntary gift on ground of, 59, 111.
trust founded on, 35.
trustees not allowed expenses if guilty of, 213.

FREEHOLD ESTATES, 2.

FUND,
costs out of, 347.
in Court, impounding, 207.

FUTURE ILLEGITIMATE CHILDREN, trust for, 35.

GETTING IN TRUST ESTATE, 136, 137, 140.

GIFT,
by *c. q. t.* to trustee, 252.
coupled with duty, 248.
to persons in fiduciary capacity, 111.
religious houses, 4.
trustee disclaiming, 133.

GOOD FAITH, onus of proving, in case of gift to person in fiduciary capacity, 111.

GOVERNMENT
cannot be trustee, 129.
may be *c. q. t.*, 127.
create trust, 124.

GOVERNMENT SECURITIES, when trustee bound to invest in, 160, 410, 445, 453.
See TRUSTS ACT, 1882.

GUARDIAN,
may not profit by office, 254.
onus of proof of good faith on purchase from, 292.
setting aside gift to, by ward, 113.

HEIRS OF *C. Q. T.*, failure of, 256.

HEIRS OF TRUSTEE, disclaimer by, 132.

HIGH COURT,
petition for advice of, 218.
under Religious Societies Act, 463.
Trustees' and Mortgages' Powers Act, 459.
See TRUSTS ACT, 1882.

HIGH COURT CHARTER, 27.

HINDU,
devisee, liability of purchaser from, to debts of ancestor, 231.
family, liability of manager of, to account, 158.
purchaser from manager of, 306.
trust by married woman of stridhan, 125.
widow, alienation by, 147.
waste by, 145.

HINDUS,
declarations of trust by, 51.
perpetuities among, 40.
religious trusts among, *see* RELIGIOUS TRUSTS AMONG HINDUS; TRUSTS ACT, 1882.

HINDU WILLS ACT, ss. 1, 7, p. 342.

HOSPITAL, trust for, 352.

IDOL,
gift to, 370.
suit for breach of trust of property dedicated to, 364.

ILLEGAL CONTRACT, trust founded on, 35.
See TRUSTS ACT, 1882.

ILLEGAL PURPOSE, failing, 48.
resulting trust, 85.

ILLEGALITY, plea of, 48, 49.

ILLEGITIMATE CHILDREN, trust for, 35.

IMAGINARY VALUE, trustee when charged with, 182.

IMMORAL PURPOSES, trust for, 35, 48.

IMMOVEABLE PROPERTY,
beyond jurisdiction, trust of, 26.
in foreign country, trust of, 49.
trust of, for religious or charitable purpose, 351.
See TRUSTS ACT, 1882.

IMPARTIAL, trustee bound to be, 152.
See TRUSTS ACT, 1882.

IMPLIED TRUSTS, 77.
agreement to settle property, 83.
precatory words.
certainty requisite, 79.
entreaty, 78, 79.
intention to give absolutely not cut down by, 80.
maintenance, 80.
object must be described, 79.
recommendation, 78, 79.
vendor when trustee for vendee, 83.

IMPOUNDING FUND IN COURT, 207.

IMPROVEMENT,
allowance to trustee for, when ordered to reconvey, 290.
of particular place, trust for, 354.

'INAM,' effect of use of the word, 383.

'INCAPABLE TO ACT,' what is, 329.
See TRUSTS ACT, 1882.

INCOME, accumulation of, when applicable for future maintenance, 226.

INCOMPLETE TRUST not enforced against settlor, 53.

INCUMBRANCES,
covenant against, by trustees, 225.
new trustee not bound to inquire as to, 176.

INDEMNITY,
clause of, 201, 209.
not protection against negligence, 141.
when presumed, 456.
decree of Court of first instance is —— to trustee, 217.
from gainer by breach of trust, 217.
to passive trustee, 206.
persons obeying orders under Trustee Act, 443.
when trustee entitled to bond of, 178, 216, 270.
See TRUSTS ACT, 1882.

INDEPENDENT ADVICE, donor should have, 117.

INFANT,
cannot create trust, 125.
exercise discretionary trust, 127.
c. q. t., power to apply property for maintenance of, 221, 226, 454.
may be trustee, 127.
purchase from, by guardian, 264.

INFORMATION, duty of trustee to furnish *c. q. t.* with, 157.
See TRUSTS ACT, 1882.

INHABITANT of particular place, trust for, 353.

INJUNCTION,
power of Court to interfere with discretionary power by, 212.
to restrain trustee from committing breach of trust, 206, 287.
proceedings by another Court, 31.
waste by tenant-for-life, 142.
Hindu widow, 146.
See TRUSTS ACT, 1882.

INSOLVENCY—
proof in, by trustees and executors, 241.
of trustee, remedy of *c. q. t.* in case of, 168.
trust to cease on, 41, 45.
when ground for appointment of new trustee, 330.

INSOLVENT—
may be trustee, 131.
purchase of estate of, by assignee, 264.
trustee, necessary party to suit, but not his representatives, 344.
See TRUSTS ACT, 1882.

INSOLVENT ACT, ss. 9, 24, p. 65.

INSPECTION—
of documents, right of *c. q. t.* to, 272.
under Registration of Societies Act, 395.

INSTALMENTS, payment of debt by, 138.

INSTRUMENT OF TRUST, discharge of trustees from office under power in, 327.

INSURANCE of trust-property, 140, 221.

INTENTION—
of author of trust carried out, 20, 24, 80, 283.
to create trust, 52.
take property unconverted, 321.

INTEREST—
compound, liability of executor or administrator to pay, 313.
trustee, 166, 318,
See TRUSTS ACT, 1882.
liability of *c. q. t.* to refund purchase-money with, 289.
executor or administrator to pay, 313.
trustee to pay, 165, 314.
on advances by trustee, 216.
costs not allowed, 213.
rate of, 167.
trustee not liable to pay when he has paid trust-fund to wrong persons, 178.

INVENTORY OF CHATTELS, trustee should make, 137.

INVESTMENT,
authority to invest on personal security may be given by author of trust, 161.
breach of trust, conversion of trust-fund into improper securities [is, 160.
neglect to follow directions in instrument of trust as to —— is, 160.
by Official Trustee, 410.
c. q. t., one not to be benefited by —— at expense of another, 162.
consent of *c. q. t.* to change of, 162.
Court, 163.

INVESTMENT—(*continued*).
continuing investments, duty of trustee as to, 162.
conversion of trust-fund into unauthorized securities is breach of trust, 160.
directions of instrument of trust as to —— to be followed, 160.
discretion of trustee as to, not interfered with, 154.
what securities authorized when mode of investment left to discretion of trustees, 161.
duties of trustees as to —— generally, 159.
employment of solicitor to make, 236.
Government securities, when trustees bound to invest in, 160.
non-investment, liability of trustee for, 314.
remedy of *c. q. t.* for, 165.
of moneys arising from sale, 445.
on banker's notes-of-hand, 142.
mortgage, precautions to be taken, 163.
personal security as a rule is breach of trust, 160.
when allowed, 161.
private securities, 161.
securities of foreign States, 161.
shares in private companies, 161.
power of varying, 162, 225.
Official Trustee as to, 164.
remedy of *c. q. t.* for non-investment, 165.
for wrongful investment, 167.
trustee giving receipt for conformity bound to see to, 194.
trustees may not lend to themselves, 163.
under Trustees' and Mortgagees' Powers Act, 164, 453.
varying securities, 162, 225.
See TRUSTS ACT, 1882.

IRREVOCABLE, trust completed is, 59, 380.

JEWS, trust for, 353.

JOINING,
in breach of trust, liability of *c. q. t.* for, 322.
See TRUSTS ACT, 1882.
in receipt for conformity, 194.
See TRUSTS ACT, 1882.

JOINT HINDU FAMILY, purchase from manager of, 306.

JOINT LIABILITY of trustee for sale, 168.

JOINT TENANCY on purchase in names of father and son, 94.

JOINT TENANTS, trustees are, 335.

JUDGMENT, fair exercise of, by trustees when a protection, 138.

JURISDICTION—
c. q. t. beyond, should be party to suit, 344.
new trustee should be within, 330.
trusts of immoveable property beyond, 26.
trustee beyond, not necessary party to suit, 344.

JUST ALLOWANCES, 253.

KINDS OF TRUST,
discretionary, 18.
executed and executory, 21.
lawful, 19.
ministerial, 18.
mixture of trust and power, 19.

KINDS OF TRUST—(*continued*).
private, 19.
public, 19.
simple, 18.
special, 18.
unlawful, 19.

LACHES in applying to set aside voluntary gift, 118.

LAND,
purchased with trust-money, lien of *c. q. t.* upon, 303.
suit for —— beyond jurisdiction, 27.
to be converted into money, election, 320.
trust of —— beyond jurisdiction, 26.

LANDLORD, suits by and against, in benami transactions, 100.

LAW, trust forbidden by, 35, 37.

LAWFUL TRUST, 19, 32.
See TRUSTS ACT, 1882.

LEASE,
of charity-property, suit for, 363.
trust-property, trustee may not take, 260.
wuqf property, 386.
renewal of, by trustee, constructive trust on, 107.

LEASEHOLDS,
investment on, 163.
duty of trustee to convert, 149.
See TRUSTS ACT, 1882.

LEAVE OF COURT,
when required for purchase, 171.
institution of suit, 27.
under Religious Endowments Act, 404.

LEAVE TO BID when given to trustee, 264.

LEGAL ADVICE, trustee for sale or purchase may take, 171.

LEGAL ADVISER—
right of trustee to be reimbursed expenses of, 212.
setting aside gift to —— by client, 114.
when a constructive trustee, 109.
See TRUSTS ACT, 1882.

LEGAL ESTATE, 8.

LEGAL NECESSITY—
for delegation of trust, 237.
sale by manager of Hindu family, 306.
of property devoted to idol, 374.

LEGAL REPRESENTATIVES may not purchase assets, 265.

LEGATEE, whether liable to refund legacy paid by mistake, 180.

LEND, trustees may not —— to themselves, 265.

LIABILITY,
of administrator to pay interest, 313.
agent party to breach of trust, 240.
c. q. t. joining in breach of trust, 322.
executor to pay interest, 313.

LIABILITY—(*continued*).
of partner employing trust-fund in business, 319.
purchaser to see to application of purchase-money, 228.
transferee from *c. q. t.*, 324.
See BREACH OF TRUST; CESTUI QUE TRUST; TRUSTEE.

LIEN,
agents of trustees have no, 215.
of *c. q. t.* on land purchased with trust-money, 303.
trustee for expenses out of pocket, 215.

LIMITATION, 186, 303.
in cases of charitable trust, 364.
of several liability of co-trustees, 206.
suits for turn of worship, 377.

LIMITATION ACT,
s. 10, pp. 15, 186, 304, 305.
s. 21, p. 241.
sched. ii, art. 98. p. 305.
arts. 98. 100, 133, 134, p. 15.
arts. 133, 134, p. 305.

LIMITATIONS, on gifts to religious and charitable purposes, 352.

LIVERY OF SEISIN, 3.

LOCO PARENTIS, setting aside gift to person in, 113.

LOSS BY ACCIDENT, when trustee liable for, 183.

LOTS, sale in, 223, 444.

LUNATIC cannot create trust, 124.

MADRAS, Minors' Act in, 228.

MAHOMEDAN,
benami transactions among, 100.
debtor, purchase from heirs of, 312.
declarations of trust by, 51.
law of *wuqf*, *see* WUQF.

MAINTENANCE,
discretion of trustees as to —— not interfered with, 154.
of orphans, charitable trust for, 352.
power to apply property for —— of adult *c. q. t.*, 221.
infant *c. q. t.*, 226.
precatory trust for, 80.
under Trustees' and Mortgagees' Powers Act, 454.

MAIRWARRA, Minors' Act in, 228.

MANAGEMENT,
of trust for idol, 218.
petition for advice of High Court as to, 218, 459.
removal of Hindu widow from, 147.
trustee entitled to be reimbursed expenses of, 214.

MANAGING MEMBER,
of joint Hindu family, liability of, to account, 158.
purchase from, 306.

MARRIAGE ARTICLES, executory trusts in, 21.

MARRIED WOMAN,
cannot assign interest in property settled to separate use, 274.
claim fund settled to her separate use, 272.
creation of trust by, 125.
may be trustee, 131.
See TRUSTS ACT, 1882.

MASSES, trust for, 350.

MEDICAL ADVISER, setting aside voluntary gift to, 111.

MERGER, 18.

MESNE PROFITS, account of, by trustee renewing lease, 109.

MINISTERIAL ACT, delegation of, 240.

MINISTERIAL TRUST, 18.

MINOR,
cannot create trust, 125.
exercise discretionary trust for sale, 127.
may be trustee, 127.
maintenance of, *see* MAINTENANCE.
payment of money of, into Court under Trustee Act, 440.
purchase from —— by trustee, 264.
See TRUSTS ACT, 1882.

MINORS' ACTS, 227, 228.

MISDESCRIPTION, effect of, on sale by trustee, 224.

MISTAKE, rectification of settlement on ground of, 72.

MITAKSHARA LAW,
gift for pious purposes by father governed by, 369.
sale of property of father governed by, 308.

MIXING trust-fund with trustee's money, 140, 142, 297, 318.
See TRUSTS ACT, 1882.

MIXTURE of trust and power, 19.

MODE
of executing trust, discretion of trustee as to, not interfered with, 155.
nor of investing, 154.

MOHUNT,
appointment of, 376.
removal of, 379.

MONEY,
duty of trustee as to trust-fund consisting of, 140.
following trust-property converted into, 295.
to be converted into land, election, 320.
See TRUSTS ACT, 1882.

MORAL NECESSITY for delegation of trust, 237.

MORTGAGE,
assignment of equitable interest by way of, 277.
duties of trustee for, 168.
investment on, 163.
See TRUSTS ACT, 1882.
not authorized by absolute trust for sale, 170.
notice of equitable assignment by, 281.
of charitable property, suit to authorize, 363.
when leave of Court required for, 168.

MORTGAGEE,
covenants entered into by, 224.
purchase by —— from mortgagor, 265.
remuneration of, 243.
renewal of lease by, constructive trust on, 109.
trustee not charged as —— for what he might have received, 182.
when allowed to purchase mortgaged estate, 258.

MORTMAIN, 14.

MOSQUES, provisions of Act XX of 1863 as to, 396.

MOTHER, no resulting trust on purchase by, 91.

MOVEABLE PROPERTY,
abroad, trust of, 32.
declaration of trust of, 51.
delivery up of, by trustee, 156.
power to sue for, 137.
trusts of, 26
See TRUSTS ACT, 1882.

MUTAWALLI, female may be, 388.
See WUQF.

NECESSITY,
for delegation of trust, 236.
sale of property of joint Hindu family, duty of purchaser to see to, 307.
decree is *primâ facie* proof of, 311.
what is, 308.
See TRUSTS ACT, 1882.

NEGLECT to follow directions in trust-deed, liability of trustee for, 184.
See BREACH OF TRUST.

NEGLIGENCE, trustee not entitled to be reimbursed his costs if guilty of, 213.

NEGOTIABLE INSTRUMENTS,
following trust-property converted into, 295.

NEW TRUSTEES,
appointment of, *see* APPOINTMENT OF NEW TRUSTEES; TRUSTS ACT, 1882.
not liable for breach of trust of predecessors, 136.
vesting immoveable property in, 436.
right to call for transfer of stock in, 437.

NEXT-OF-KIN of *c. q. t.*, failure of, 256.

NON-INVESTMENT,
liability of trustee for, 314.
remedy for, 165.

NOTES, following trust-property converted into, 295.
See TRUSTS ACT, 1882.

NOTICE,
constructive, what is, 104, 165.
following trust-property into hands of purchaser with, 292.
of assignment of equitable interest, 56.
breach of trust, 231.
charge of legacy, duty of trustee on receiving, 325.
election to take property unconverted, 321.
equitable title, 273.
motion for payment of trust-fund into Court, 337.
purchase of *chose-in-action*, 273.
trust, what is, 293.
payment of trust-fund to *c. q. t.* without —— of transfer, 208.
purchase without —— of benami property, 103.
reconveyance by purchaser with, 289.

NOTICE—(*continued*).
to trustees on purchase of equitable interest, 276.
agents of company, 279.
assignee of debt not bound to give, 281.
bankers, 280.
before trust-fund received, 280.
description of property to be given, 278.
directors of company, 279.
immoveable property, rules as to, do not apply to, 281.
manager of Company, 279.
objects of, 276.
officer of company, 279.
one of several trustees, 280.
policy of assurance, 277.
priorities, 276.
reputed ownership, 278.
shares, 277.
shareholder, 279.
solicitor, 279.
stop order, 281.
to whom to be given, 279.
trustee purchasing, 280.
what is sufficient, 279.
trust-property cannot be followed into hands of purchaser for valuable consideration without, 293.
See TRUSTS ACT, 1882.

NUMBER OF TRUSTEES, 132, 328.
See TRUSTS ACT, 1882.

OBJECT OF TRUST must be lawful, 32.

OFFICE,
of trustee is onerous, 137.
joint nature of, 240.
vacating, 326.

OFFICIAL TRUSTEE, *see* OFFICIAL TRUSTEE'S ACT; TRUSTS ACT, 1882.

OFFICIAL TRUSTEE'S ACT, 407.
accounts to be kept, 411.
administrator may pay share of infant or lunatic to Official Trustee, 415.
Administrator-General may be Official Trustee, 408.
Advocate-General, referring auditor's report to, 414.
annual schedules to be furnished, 412.
appointment of Official Trustee as trustee by Court, 409.
must always be sole trustee, 410.
audit of accounts, 413.
charitable purposes, when Official Trustee may be appointed trustee for, 409.
commission of Official Trustee, what expenses covered by, 410.
costs of preparing schedules, 413, 414.
reference to Advocate-General, 414.
suit, 411.
execution of orders of High Court, 414.
executor may pay share of infant or lunatic to Official Trustee, 415.
High Court, power of, to make orders respecting property vested in Official Trustee, 410.
inspection of accounts, 411.
schedules, 412.
investments allowed, 410.

OFFICIAL TRUSTEE'S ACT—(*continued*).
leave of absence, 408.
order, who may apply for, 415.
petition for appointment of Official Trustee as trustee, 409
order respecting property vested in Official Trustee, 410.
publication of rules respecting Official Trustee's office, 412.
religious trust, Official Trustee may not hold, 409.
removal of Official Trustee, 408.
remuneration under settlement, 409.
where appointed by Court, 409.
re-transfer of property vested in Official Trustee, 410.
rules, power of Chief Justice to make —— as to Official Trustee's office, 412.
schedules to be furnished annually, 412.
securities on which investment allowed, 410.
security to be given, 408.
suits by and against Official Trustee, 411.
trusts which may be held by Official Trustee, 409.
vesting property in, 411.

OPINION.
of counsel on title, costs of, 170.
rights of *c. q. t.* to cases for, 212.

ORIGIN OF TRUSTS in England, 1.

ORPHANS, charitable trust for, 352.

OUDH, Minors' Act in, 228.

OUT-OF-POCKET EXPENSES, lien of trustee for, 215.

OVERPAYMENT, refund on, 180.
See TRUSTS ACT, 1882.

PARENT, gift by child to, 112.

PAROL.
declaration of trust, 51.
disclaimer by, 133.
evidence by person paying purchase-money, 88.
of acceptance of trust, 122.
benami transaction, 102.
to rebut presumption of resulting trust, 85, 88.

PARTIAL ACCEPTANCE of trust, 122.

PARTIES TO SUITS.
administrators or executors when necessary, 344.
between trustees, 344.
and *c. q. t.*, 343.
by or against strangers, 341.
c. q. t. abroad necessary, 344.
suing on behalf of self and other, 345.
disclaiming trustee, 344.
for specific performance, 342
insolvent trustee, 345.
provisions of Civil Procedure Code as to, 341.
representative of deceased trustee, 343.
insolvent trustee, 344.
specially constituted, 343.
to recover moneys lost by agent, 184.
restrain breach of trust, 288.
Hindu widow from committing waste, 148.
trustees abroad not necessary, 344.

PARTITION,
subject to trust for idol, 374.
trust restricting rights of, 41.

PARTNER,
employing trust-funds in business, liability of, 319.
liability of, for breach of trust of co-partner, 183.
may not profit by trust, 250.
of solicitor trustee, remuneration of, 245.
purchasing share of deceased, 254.
payment to, 180.
remuneration of —— carrying on business, 244.
when considered a constructive trustee, 107.
See TRUSTS ACT, 1882.

PASSIVE TRUST, right of *c. q. t.* in case of, 268.

PATIENT, setting aside gift by, to medical attendant, 115.

PAYMENT
after death of *c. q. t.*, 176.
into Court of trust-fund, 336.
money of minors, etc., under Trustee Act, 440.
when retirement, 328.
on written authority of *c.q.t.*, 179.
of debts, trust for, 76.
purchase-money, 229.
after sale, 171.
in benami transaction, 102.
out of Court to single trustee, 180.
to agent of trustee, 240.
c. q. t. abroad, 207.
without notice of transfer, 208.
legatees while debts unpaid, 181.
partner, 180.
persons under disability, 180.
wrong persons, 177.
under power of attorney, 207, 457.
without notice of transfer of equitable interest, 208.

PAYMENTS, trustee may make what, 221.

PEERAGE, trust of, 26.

PENAL CODE,
s. 62, p. 126.
ss. 126, 127, 169, p. 127.
ss. 405—409, pp. 15, 183.

PERISHABLE PROPERTY, conversion of, 148—152.
See TRUSTS ACT, 1882.

PERMISSIVE WASTE, 143.

PERPETUITIES, 37.
among Hindus, 40.
gift to idol, 370.

PERPETUITY, trust in, must be for public purposes, 355.

PERSONAL LIABILITY,
of *c. q. t.* to reimburse trust, 216.
trustee for breach of trust, 137.
even though no benefit, 182.
See TRUSTS ACT, 1882.

PERSONAL SECURITY, investments on, *see* INVESTMENT; TRUSTS ACT, 1882.

PETITION,
applications under Trustee Act to be by, 438.
for advice of Court, 218, 459.
appointment of new trustees, 409.
opinion of High Court under Religious Societies Act, 463.
order respecting property vested in Official Trustee, 410.
service of, 459.
See TRUSTS ACT, 1882.

PLACES OF WORSHIP, right to erect, 380.

PLEADING,
benami transaction, 102.
fraudulent benami transaction, 106, 107.
illegality, 48, 49.
wilful default, 187.

POLICY OF ASSURANCE,
liability of trustee for not keeping up, 184.
mortgage of, 277.

POLICY OF LAW, trust against, 35.

POOR PEOPLE, trust for, 352.

POSSESSION,
of trust-estate, right of *c. q. t.* to, 268.
trustee not possession of true owner, 132.
transmutation of, not necessary to validate trust, 53.

POSTPONING enjoyment of property, trust for, 37.

POWER,
discharge of trustee from office under, 327.
execution of, by tenant-for-life, 460.
liability of trustee for not executing, 184.
mode of execution of, 451.
purchaser not bound to enquire as to, 452.

POWER AND TRUST, mixture of, 19.

POWER-OF-ATTORNEY, payment of trust-fund under, 207, 457.

POWERS of trustees generally, 211—233.

PRECATORY TRUSTS, *see* IMPLIED TRUSTS, 78.

PREDECESSOR, liability of trustee for breach of trust of, 193.
See TRUSTS ACT, 1882.

PREMIUMS, liability of trustee for not paying, 184.

PRESIDENCY BANKS cannot be trustees, 131.

PRESUMPTION,
of death, 176.
resulting trust, evidence to rebut, 88.

PRINCIPAL, when applicable for maintenance of *c. q t.*, 226.
See TRUSTS ACT, 1882.

PRIORITIES, 276, 281.

PRIVATE COMPANY, investment on stock or shares of, 161.

PRIVATE CONTRACT, when trustees may sell by, 222.

PRIVATE TRUSTS, 19.

PRIZES OF WAR, trusts of, 104, 464.
See TRUSTS ACT, 1882.

PROBATE, acceptance of trust by taking out, 121.

PRODUCTION of books of account, 157.

PROFESSIONAL ADVISER,
liability of, for advising breach of trust, 183.

PROFESSIONAL CHARGES of trustee when allowed, 247.

PROFIT,
member of Society registered under Act XXI of 1860 may not make, 394.
not to receive, on dissolution, 462.
trustee may not —— from his office, 250.
account of, 251.
agent, 254.
auctioneer trustee, 255.
broker, 255.
buying in debts or mortgages, 252.
c. q. t. cannot give to trustee, 252.
directors, 254.
employing trust-funds in trade, 251.
extent of liability, 256.
rule, 253.
guardian, 254.
inspectors under creditors' deeds, 255.
officers of companies, 255.
partners, 253.
See TRUSTEE ACT, 1880.

PROFITS, right of *c. q. t.* to, 268.

PROMISSORY NOTE, trustee may not invest on security of, 160.

PROOF in insolvency by trustees and executors, 240.

PROTECTING TITLE to trust-property, 137.
See TRUSTS ACT, 1882.

PROTECTION,
of trust-property, right of trustee to take steps for, 219.
See TRUSTS ACT, 1882.

PROXY, delegation of ministerial acts to, 240.
See TRUSTS ACT, 1882.

PUBLIC AUCTION, when trustee may sell by, 222.
See TRUSTS ACT, 1882.

PUBLIC FUNDS, no suit lies for account of, 217.

PUBLIC GARDEN, trust for, 352.

PUBLIC POLICY, setting aside voluntary gifts on ground of, 111.

PUBLIC PURPOSES, trust in perpetuity must be for, 355.

PUBLIC TRUSTS, 17.
all trustees need not join in executing, 241.

PUNJAB, Minors' Act in, 228.

PURCHASE,
benami in name of stranger, 98.
by mother, no resulting trust on, 91.
trustee for benefit of *c.q.t.*, 252.
for sale, 256.
duties of trustee for, 171.
from guardian, 292.
manager of joint Hindu family, 306.
in benami transactions, 98.
trustee, 86.
wife, 90.
in fictitious name, resulting trust on, 88.
name of child, 97.
and stranger, 94.
nephew, 92.
stranger, 86.
of debt by trustee or executor, 252.
insolvent's estate by creditor or assignee, 264.
trust-property by trustee, nature of relief granted, 289.
from *c. q. t.*, 261.
with notice of trust, 104.

PURCHASE-MONEY,
liability of purchaser to see to application of, *see* APPLICATION OF PURCHASE-MONEY.
to whom payable, 229.

PURCHASER,
from heirs of Mahomedan debtor, 312.
trustee of *wuqf* property, 387.
under execution, liability of, to see to necessity, 311.
with notice, following trust-estate into hands of, 292.
reconveyance by, 289.
from purchaser without, trust-property cannot be followed into hands of, 293.
without notice from purchaser with, trust-property cannot be followed in hands of, 293.
of benami property, 103.
remedy of *c. q. t.*, 184.
trust-property cannot be followed in hands of, 293.
voluntary gift not set aside as against, 115.
See TRUSTS ACT, 1882.

REBUTTING,
presumption of advancement, 94.
death, 176.
resulting trust, 85, 89.

RECEIPT,
all trustees must join in, 240.
executor joining in, for conformity, 199.
of trustee for purchase-money a discharge, 446.
trustee joining in, for conformity, 194.
See TRUSTS ACT, 1882.

RECEIVER, appointment of, *see* APPOINTMENT OF RECEIVER, 339.

RECOMMENDATION, when words of, create trust, 78.

RECONVEYANCE
by purchaser with notice from trustee, 289.
by trustee who has purchased trust-estate 289.

RECOVERY of debts due to trust-estate, duty of trustee as to, 137.

REDEMPTION, suit for, 28.

REFUND, liability of *c. q. t.* to, if overpaid, 180.

'REFUSING TO ACT,' what is, 328.

REGISTER, neglect to, is breach of trust, 181.

REGISTRATION OF SOCIETIES ACT, 391.
bye-law, power of society registered under Act to make, 393.
certified copies of documents filed under Act, 396.
Societies—
dissolution of registered, under Act, 394.
formation of, 391.
governing bodies of, 395.
inspection of documents of, 395.
judgment against, how enforced, 392.
liabilities of members of, 393.
members of, who are, 395.
memorandum of association of, 391.
power to alter, extend, or abridge purposes, 393.
profit, member may not make, 394.
purposes for which they may be registered, 391.
registration of, formed before Act, 395.
suits by and and against, 392.
vesting of property of, 392.
what, subject to Act, 396.

REIMBURSEMENT OF TRUSTEE,
accounts must be kept, 214.
advances, 214.
in respect of different estates, 216.
interest on, 216.
lien for, 215.
suit to recover, 216.
allowed without express provision in trust-deed, 212.
costs, 213.
employment of agents, 212.
expenses, out-of-pocket, 212.
fees to counsel, 212.
indemnity to trustees, 216.
legal adviser, 212.
lien for advances, 215.
management, expenses of, 214.
of trustee, personal liability of *c. q. t.*, 216.
repairs, 215.
travelling expenses, 212.
wrongful act of agent, 215.
See TRUSTS ACT, 1882.

RELATIVES should not be appointed trustees, 132, 285.

RELEASE
of debts, 272.
trustee who has committed breach of trust, 192.
on handing over assets, 177.

RELIGIOUS ENDOWMENTS ACT, 396.
accounts, 401.
district committee may call for, 399.
may be filed in Court, 406.

RELIGIOUS ENDOWMENTS ACT—(*continued*).
appointment of committee, etc., 399.
trustee by Court, 399.
committee, appointment of, 399.
no member of, to be trustee, 400.
suit against, 401.
tenure of office of, 400.
transfer of property to, 401.
vacancies in, how filled, 400.
who may be member of, 400.
costs of suit, 404.
Court, appointment by, of trustee, etc., 399.
criminal breach of trust, 406.
dismissal of trustee, 398.
election of committee, 400.
endowments within Act, 396.
partly religious and partly secular, 406.
leave to institute suit, 404.
manager, appointment of, 396.
to keep accounts, 401.
suit against, 401.
mosques, 396.
regulations repealed, 397.
succession to trusteeship, 398.
suit in respect of trust, 401.
temples, 396.
transfer of property to committee, 401.
trustee, 398.
trustee, accounts of, 401.
appointment of, by Court, 399.
dismissal of, 398.
rights and powers of, 399.
suits against, 401.

RELIGIOUS HOUSES, gifts to, 4.

RELIGIOUS SOCIETIES ACT, 1880, p. 461.
adjustment of affairs of societies, 462.
appointment of new trustees, 461.
costs of application to High Court, 463.
dissolution of societies, 462.
new trustees, appointment of, 461.
petition for opinion of High Court, 463.
profit, members of society not to receive on dissolution, 462.
questions may be submitted to High Court, 463.
record of appointment of new trustees, 461.
saving of existing modes of appointment, 462.
vesting property in new trustees, 462.

RELIGIOUS TRUSTS, 14, 349.
Advocate-General, powers of, as to, 363.
alienation of estates devoted to, 369.
altering scheme of, 358.
under Civil Procedure Code, 363.
appointment of new trustees, 365
apportionment of fund bequeathed for, 360.
breach of trust, 362.
redress for, 363.
representatives of testator may sue, 364.
worshippers of idol, 364.
certainty in gift requisite, 355.

RELIGIOUS TRUSTS—(*continued*).
Civil Procedure Code, provisions of, as to, 363.
controlling revenue, duty of visitors as to, 367
cy près, doctrine of, as applied to, 357.
devise of immoveable property for, 352.
failure of objects, 359.
liability of trustees of —— to account, 364.
limitation of suits respecting, 364.
new trustees, of appointment of, 365.
under Religious Societies Act, 365.
objects of, 352.
bibles, 353.
churches, 353.
dissenters, 352.
masses, 350.
ministers of churches, 353.
prayers for the benefit of the soul, 350.
Official Trustee may not hold, 409.
principles of construing will containing, 357.
provisions of Succession Act as to devises for, 352.
purchaser without notice from purchaser with notice, 368.
Religious Societies Act, provisions of, as to appointment of new trustees, 365.
scheme for carrying out, 362.
security for costs of suit respecting —— when to be given, 364.
superstitious uses, 350.
vesting property in trustees of, 367.
visitors, duties of, 367.

RELIGIOUS TRUSTS AMONG HINDUS,
alienation of trust-property, 374
celibacy of manager, 378.
certain, gifts to —— must be, 370.
colourable gift to idol, 370.
creation of trust, 369.
devise subject to trust, 373.
election of manager, 378.
enjoyment of endowed property, 376.
evidence of endowment, 379.
execution of trust, 380.
gifts by Oudh taluqdars, 371.
how far sale of trust-property set aside, 375.
limitation, 377.
management vested in different persons, 377.
manager bound to celibacy, succession to trust in case of, 378.
Mitakshara law, 369.
Oudh Taluqdars' Act, 371.
partition subject to trust, 374.
proof of succession, 377.
removal of mohunt or trustee, 379.
reversion of managership, 379.
sale of turn of worship, 375.
subject to trust, 374.
succession to trusteeship, 376.
tenure in trustee, nature of, 371.
trust irrevocable, 380.
trustee may not benefit by trust, 375.

REMEDY for breach of trust, *see* BREACH OF TRUST; RELIGIOUS TRUSTS; TRUSTS ACT, 1882.

REMOVAL,
of Hindu widow from management, 147.
Official Trustee, 408.
trustee of idol; 379.
wuqf property, 387.
suit for, 284.

REMUNERATION OF TRUSTEE. 242.
as general rule not allowed, 242.
Administrator-General, 250.
agent becoming executor, 243.
expenses of, 249.
auctioneer also mortgagee selling trust-property, 243.
author of trust may fix, 247.
carrying on business of deceased partner, 243.
committee of lunatic's estate, 243.
contract with *c. q. t.*, 248.
curators, 249.
estoppel of *c q. t.* by settled account, 247.
expenses of agent, 249.
gift coupled with duty, 248.
mortgagee 243.
Official Trustee, 249, 409.
out-of-pocket expenses, 244.
paid agents, 249.
professional charges, 244, 247.
receiver, 243, 448.
solicitor-trustee, charges for professional services by, 244. 245
surviving partner, express trustee not allowed remuneration for carrying on business, 243.
trustee appointed by Court, 246.
See TRUSTS ACT, 1882.

RENEWAL OF LEASE
by mortgagee, constructive trust on, 109.
trustee, 107.

RENOUNCE, trustee cannot, after acceptance, 234.
See TRUSTS ACT, 1882.

RENTS, right of *c. q. t.* to, 268.
See TRUSTS ACT, 1882.

REPAIRS,
allowance to trustee for, when ordered to reconvey, 290.
right of trustee to be reimbursed money expended on, 215.
when trustee may expend money on, 221.

REPRESENTATIVES.
for purposes of suit, 343.
of *c. q. t.*, suit against, to recover advances, 216.
trustee, discharge of, by Court, 333.
liability of, for his breach of trust, 182.
when necessary parties to suit, 343. 344.
setting aside voluntary gift at instance of donor's, 118.

RESALE,
conditions of sale as to, 224.
delay in making, 225.
of property wrongfully purchased by trustee, 291.
See TRUSTS ACT, 1882.

RESCINDING CONTRACT, conditions of sale as to, 224.

RESERVED BIDDING, trustee for sale may fix, 180.

RESIDENCE ABROAD when ground for appointment of new trustee, 330.
See TRUSTS ACT, 1882.

RESTORING TRUST FUND to original state, 167.

RESTRAINT ON ALIENATION, 37, 40.

RESULTING TRUSTS, 11.
advancement, purchase in name of wife or child raises presumption of, 90. 91.
rebuttal of presumption. 94.
conveyance to stranger without consideration, 90.
devise of property purchased in name of wife or child, 95.
dividends received by father, 95.
evidence to rebut presumption of advancement, 94.
resulting trust, 85.
expression of wish as to application of purchase-money, 87.
fiduciary relation, 92.
illegal purpose, 85.
intention to exclude heirs, 84.
joint purchase, 87.
tenancy, 94.
no trust declared, 86.
parol evidence on part of person paying purchase-money, 88.
to whom conveyance made, 88
rebut presumption of resulting trust, 85.
as to part of property, 89.
possession by father, 95.
presumption of advancement, 91.
rebuttal of, 94.
purchase by mother in name of child, 91.
in fictitious name, 88.
in name of child and stranger, 94.
fully advanced, 96.
nephew, 92.
reputed wife, 91.
trustee, 86.
stranger. 87.
wife or child, 90.
void as against creditors, 92.
purchase-money unpaid, 94.
Statute of Frauds, 89.
subsequent acts and declarations, 95.
surrounding circumstances, 93.
transfer of stock into name of another, 86.
trust declared of part of estate, 86.
vague, 86.
undisposed of interest, 83.

RETIRE, payment to trustee to, 330.

RETIREMENT of trustee from office, 326.

RETIRING
from trust, what is, 328.
trustee whether bound to appoint successor, 331.

REVERSION of right to manage *debuttur* property, 379.

REVERSIONARY HEIR, suit by, to restrain Hindu widow from committing waste, 145.

REVOCATION,
conveyance with power of, 68.
of creditor's deed, 73.
trust, 59, 336.
wuqf, 384.

ROMAN CATHOLICS, trust for, 353.

SALARY of person employed by direction of author of trust, 215.

SALE,
by benamidar, setting aside, 103.
father governed by Mitakshara law, 308.
manager of joint Hindu family, setting aside, 307.
son to father, onus of proving validity of, 112.
discretionary trust for, cannot be exercised by infant, 127.
duties of trustee for, 168.
of charity-property, suit for, 363.
debuttur property, 376.
property subject to trust for idol, 374.
trust-property how to be made, 222.
turn of worship, 376.
time within which to be made, 172.
trustee for, cannot purchase trust-estate, 356.
remedy of *c. q. t.* on —— to purchaser without notice, 184.
See TRUSTS ACT, 1882.

SANAD, trust of property held under, 127.

SCHEME
of charity, alteration of, by Court, 358.
suit respecting, 363.

SCHOOL, trust for, 352.

SEBAIT, purchase of *debuttur* property from, 307.

SECOND MORTGAGE, investment on, 163.

SECURITIES,
duty of trustee to realize, 137.
upon which trustee may invest, *see* INVESTMENT; TRUSTS ACT, 1882.

SECURITY,
trustee about to abscond may be required to give, 182.
on payment out of trust-fund after presumption of death of *c. q. t.* arises, 177.

SEISIN, 3.

SELECTION of objects of trust, discretion of trustees as to, not interfered with, 153.

SEPARATE ACCOUNT, duty of trustee to keep, at bank, 140.

SEPARATE USE.
married woman cannot assign property settled to her, 271.
nor claim fund so settled, 272.
See TRUSTS ACT, 1882.

SERVICE of petition, 459.

SET-OFF,
assignee of equitable interest takes subject to any right of, 274.
See TRUSTS ACT, 1882.
not allowed in respect of breach of trust, 192.
right of solicitor to —— payments against receipts, 216.
See TRUSTS ACT, 1882.

SETTING ASIDE.
purchase of trust-estate by trustee, 259.
sale by manager of joint Hindu family, 307.
debuttur property, 375.
voluntary settlement, 59.
gifts, 194.
See CONSTRUCTIVE TRUSTS.

SETTLEMENT,
of accounts, right of trustee to, 219.
rectification of, 72.

SETTLOR, when he may defeat settlement, 67.

SEVERAL LIABILITY of trustees, 206.
See TRUSTS ACT, 1882.

SEVERING DEFENCE, effect of, 345, 346.

SHARE in trust-fund, payment of, into Court, 338.

SHARES,
investment in, 161.
mortgage of, 277.

SIMPLE TRUST, 18.

SINGLE TRUSTEE, payment out of Court to, 180.

SISTER, gift by younger to elder, setting aside, 115.

SOLDIERS, trust for, 352.

SOLICITOR, employment of, to invest, 236.
has no lien, 215.
liability of, for breach of trust by partner, 183.
not entitled to receive purchase-money on sale, 229.
notice of equitable assignment to —— of trustees, 280.
remuneration of —— when trustee, 245, 249.
setting aside gift by client to, 114.
when constructive trustee, 110.

SON, purchase *benami* in name of, 98.
See RESULTING TRUSTS.

SOVEREIGN,
may be trustee, 129.
create trust, 124.

SPECIAL CONDITIONS of sale, 224.
See TRUSTS ACT, 1882.

SPECIFIC MOVEABLE PROPERTY, power to sue for, 137.

SPECIFIC PERFORMANCE,
not enforced against trustees selling by mistake at under-value, 169.
parties to suit for, 342.

SPECIFIC POWER, execution of, 241.

SPECIFIC RELIEF ACT,
s. 3, p. 15.
s. 10, p. 137.
s. 11, p. 156.
s. 12, p. 271.
s. 54, pp. 286, 287.

SPECIFIC TRUST, 18.

SPIRITUAL ADVISER, setting aside voluntary gift to, 111, 112.

STAKE-HOLDER, trustee is merely a, 182.

STAMP
on orders under Trustee Act, 441.
transfer of trust-property to new trustee, 330.

STANDING BY on sale by benamidar, 103.

STATUTE OF FRAUDS,
declarations of trust under, 52.
provisions of, as to resulting trusts, 89.

STATUTE OF USES, 6.

STOCK,
directions as to transfer of, under Trustee Act, 433.
liability of trustee for not enforcing transfer of, 184.
of private company, investment on, 161.
resulting trust on transfer of, into name of another, 86.
vesting order as to, under Trustee Act, 425.

STOP ORDER, 281.

STRANGER,
purchase benami in name of, 98.
resulting trust on purchase in name of, *see* RESULTING TRUST.
setting aside gift as against, 115.

STRANGERS, parties to suits by and against, 341.

STRIDHAN, trust of, 125.

SUB-INFEUDATION, 2.

SUBJECT-MATTER OF TRUST, 25, 467.
to be pointed out on declaration, 52.
See TRUSTS ACT, 1882.

SUCCESSION
to office of mutawalli, 388.
trusteeship of idol, 376, 377, 378,
under Act XX of 1863, 398.

SUCCESSION ACT,
s. 101, pp. 26, 27, 39.
s. 105, pp. 352, 371.
ss. 187, 190, p. 342.

SUCCESSOR, whether retiring trustee must appoint, 331.

SUITS,
against trustees, limitation of, 303.
between trustees and *c. q. t.*, parties to, 343.
by and against Official Trustee, 411.
creditors against benamidar, 104.
purchasers of equitable interest for conveyance, 273.
real owner against benamidar, 104.
strangers to trust, 341.
trustee to recover advances, 216.
duty of trustees to bring and defend, 137.
for appointment of new trustees, 284.
delivery up of title-deeds, 212.
execution of trust, 282.
land beyond jurisdiction, 27.
possession, on waste by Hindu widow, 146.

SUITS—(*continued*).
in respect of religious establishments under Act XX of 1863, p. 401.
necessary parties to, 284, 331, 341.
respecting charities, 363.
to administer trusts, 217.
carry out purchase, 171.
compel trustee to convey, 269.
do act of duty, 287.
discharge trustees, 331.
have proper number of trustees appointed, 284.
remove trustees, 284.
restrain waste by tenant-for-life, 142.
Hindu widow, 145.
trustees may not deal with trust-property after institution of, 168.

SUPERSTITIOUS USES, trust for, 350.

SURETIES, trustee not appointed without, 340.

SURPRISE, setting aside voluntary gift on ground of, 111.

SURVIVAL OF TRUST, 335.
See TRUSTS ACT, 1882.

SURVIVING PARTNER carrying on business, remuneration of, 243.

SURVIVOR, appointment of new trustee by, 328.

SUSPENSION of trustees' power after decree, 232.
See TRUSTS ACT, 1882.

TAXATION OF COSTS, 213.

TECHNICAL WORDS not necessary to declaration of trust, 52

TEMPLES,
provisions of Act XX of 1863 as to, 396.
trusts for, 14.
trustee of, cannot renounce after acceptance, 234.

TENANT purchasing land on sale for arrears of Government revenue is a constructive trustee, 109.

TENANT-FOR-LIFE,
trustee authorized to lend on personal security may not lend to, 266.
waste by, 142—5.

TENURES, 1.

TIMBER, when trustee may cut down, 173.

TIME,
for realizing assets, 221.
of essence of contract, conditions of sale as to, 224.
within which sale to be made, 172.
See TRUSTS ACT, 1882.

TITLE,
duty of trustee for purchase to obtain, 171.
in third persons, duty of trustees as to, 156.
of *c. q. t.*, right of trustee to have proof of, before distributing trust-fund, 175.
to trust-property, duty of trustee to protect, 137.
trustee cannot set up adverse —— to trust-property, 155.
trustees for sale bound to make a good, 170.
See TRUSTS ACT, 1882.

TITLE-DEEDS,
custody of, 272.
right of trustees to, 211.
suit for delivery up of, 212.
See TRUSTS ACT, 1882.

TITLE OF HONOUR, trust of, 26.

TOMBS, trusts for, 49, 354.

TOWN, trust for a, 354.

TRADE, liability of trustee for employing trust-money in, 251, 314.

TRANSFER,
of property of religious establishment to committee, 401.
to trustees of religious establishment, 398.
stock into name of another, resulting trust on, 86.
wuqf property, 386.
payment of trust-fund with notice of, 208.
under Trustee Act, 421.
See TRUSTS ACT, 1882.

TRANSFERREE from *c. q. t.*, rights of, 324.

TRANSMUTATION of possession not necessary to validate trust, 53.

TRAVELLING EXPENSES, right of trustee to be reimbursed, 212.

TRUST,
alienation of *wuqf* lands subject to, 386.
acceptance of, 120.
appointment of trustee for purpose of committing breach of, 330.
by operation of law, *see* CONSTRUCTIVE TRUST; IMPLIED TRUST; RESULTING TRUST.
creating perpetuity, 37.
declaration of, *see* DECLARATION OF TRUST.
definition of, 16.
in Trusts Act, 464.
disclaimer of, by renunciation of probate, 122.
extinction of, 335.
for accumulation, 37.
bathing ghat, 14.
charity, *see* CHARITABLE TRUST.
creditors, 14.
revocation of, 73.
See CREDITORS.
future illegitimate children 35.
idol, 14, 370.
execution of, 380.
immoral purposes, 35.
payment of debts, 76.
purpose of defrauding creditors, 59.
religious purposes, 14.
See RELIGIOUS TRUSTS.
sale, *see* SALE.
forbidden by law, 35, 37, 465.
founded upon illegal contract, 35.
implied, *see* IMPLIED TRUST.
incomplete not enforced against settlor, 53.
intended as fraud on Act, 35.
not allowed to fail for want of trustee, 282.
object of, must be lawful, 32.
of equitable interest, 56.

TRUST—(*continued*).
of immoveable property—
beyond jurisdiction, 26, 49.
in colonies, 29, 31.
in foreign country, 29, 49.
moveable property, 25.
abroad, 32.
part of estate, 86.
peerage, 26.
title of honour, 26.
parties to suit respecting, *see* PARTIES TO SUITS.
partly lawful and partly unlawful, 49.
postponing enjoyment of property, 37.
property, cannot be followed into hands of purchaser without notice from purchaser with notice, 293.
nor into hands of purchaser with notice from purchaser without, 293.
conveyance of, to *c. q. t.*, 175.
distribution of, 175.
duty of trustee to acquaint himself with state of, 134.
employment of, by partner in business, 319.
following after conversion, 294.
restraining alienation, 37, 40.
revocation of, 59.
right of *c. q. t.* to execution of, 271.
subject-matter of, 25.
suit for administration of, 217.
survival of, 335.
to cease on happening of particular event, 46.
insolvency, 41, 45.
to sell, resulting trust on, 85.
trustee cannot renounce after acceptance of, 234.
vacate office till performance of, 326.
who may create, 124, 467.

TRUSTS ACT, 1882.
abroad, person domiciled, not a proper trustee, 484.
residing, when ground for appointment of new trustee, 489.
absence when ground for appointment of new trustee, 489.
acceptance of trust, 467.
trustee cannot renounce after, 481.
accounts, beneficiary has right to copies of, 483.
settlement of, 477.
trustee to keep, 471.
accumulation of property of minor, 479.
acquiescence by beneficiary in breach of trust, 472.
acquisition by trustee of property wrongfully converted, 486.
act of duty, performance of, may be compelled, 485.
Administrator-General, remuneration of, not affected by Act, 482.
advancement of minors, 479.
advantage gained by fiduciary character, trust on, 493.
secretly gained by one of several compounding creditors, 495.
adverse title, trustee may not set up, to trust-property, 469.
advice of Court, application for, 477.
agent gaining advantage by fiduciary character, trust on, 493.
of trustee for sale may not buy trust-property, 482.
alien enemy not a proper trustee, 484.
application for opinion of Court, 477.
appointment of new trustee, 489.
discharge of trustee by, 488.

TRUSTS ACT, 1882—*(continued)*.
arbitration, power of trustee to submit to, 480.
attorney, delegation of ministerial act to, 481.
auction, sale by, 478.
beneficial interest, trust of, 467.
beneficiary, breach of trust by, 472.
consent by, to delegation of trust, 481.
investment when required, 472.
remuneration of trustee, 481.
varying investments, 477.
definition of, 465.
discharge of trustee by, 488.
disclaimer by, 467.
entitled to accounts and information, 471.
forfeiture of interest of, to Government, 475.
inspection of documents by, 483.
joining in breach of trust, liability of, 487.
reimbursement of trustee by, 476
rents and profits of trust estate, rights of, to, 483.
revocation of trust by, 491.
rights and liabilities of, generally, 483.
right of, to compel performance of act of duty by trustee, [485.
proper number of trustees, 484.
restrain breach of trust, 485.
specific execution of trust, 483.
suit by, for specific execution of trust, 484.
transfer of beneficial interest of, 484
possession of trust-property to, 483.
who may be, 467.
bequest, for illegal purpose, 493.
revocation of, prevented by coercion, trust on, 493.
blended property, rights in case of, 487.
breach of trust, beneficiary joining in, 487.
definition of, 465.
indemnity to trustee from gainer by, 476.
liability of trustee for, 472.
for breach of trust of co-trustee or predecessor, [474.
loan by trustees to themselves, 482.
purchase by trustee of trust-property, when, 482.
restraining commission of, 485.
set-off not allowed in respect of, 474.
buy, trustee for sale may not, 482.
buy in, power of trustee to, 473.
calling in trust-property, 478.
care required from trustee, 469.
certainty in declaration of trust requisite, 466.
charitable trusts, not subject to Act, 464.
coercion, revocation of bequest prevented by, trust on, 493.
compound interest, when payable, 473.
compounding debts, 480.
concurrence in breach of trust, 472.
conditions, power of trustee to make special, 478.
conformity, trustee joining in receipt for, 474.
consent to delegation of trust, 481.
investment, 472.
remuneration of trustee after acceptance, 481.
varying investments, 479.
consideration, transfer of property for —— paid by another, 492.
constructive trust, 495.

TRUSTS ACT, 1882—(*continued*).
contract, every person competent to —— may create trust, 467.
sale by, 478.
contribution between co-trustees, 475.
control, by Court, of discretionary power, 481.
conversion of perishable property, 470.
convey, power of trustees to, 478.
copies of documents, right of beneficiary to, 483.
costs of petition for advice of Court, 477.
to discharge trustees, 489.
co-trustees, cannot act singly, 481.
contribution between, 475.
disclaimer by one of several, 467.
may not lend to themselves, 482.
several liability of, 475.
trustees, when liable for default of, 474.
Court, application for advice or opinion of, 477.
appointment of new trustees by, 489.
consent of, to application of principal towards expenses of minor, 479.
control of discretionary power by, 481.
discharge of trustee by, on petition, 488.
purchase of beneficiaries' interest with leave of, 482.
renunciation of trust after acceptance, with leave of, 481.
creation of trust, 466.
curator, remuneration of, 482.
custody of title-deeds, right of trustees to, 476.
death, vacation of office of trustee by, 488.
debentures, investment on, 471.
debtor becoming creditor's representative, 493.
debts, compounding, 480.
trust for payment of, 468.
declaration of trust, 466.
decree, suspension of trustee's powers by, 480.
definitions in Act, 464.
delegation of trust, 481.
director, gaining advantage by reason of fiduciary character, 493.
disabilities of trustees, 481.
discharge of trustees, 488.
disclaimer, by beneficiary, 467.
trustee, 467.
discretionary power, control of, by Court, 471, 481.
trust, person not competent to contract cannot execute, [467.
domicile, person having his —— abroad not proper trustee, 484.
duties of trustees, 468.
education of minors, 479.
execute trust, trustee bound to, 468.
execution of trust, suit by beneficiary for, 484.
executor gaining advantage by reason of fiduciary character, trust on, 493.
expenses, reimbursement of trustee for, 476.
extinction of trust, 490.
discharge of trustee by, 488.
extent of Act, 464.
fiduciary character, advantage gained by, trust on, 493.
following trust-property, 486.
forbidden by law, 465.
forfeiture of beneficiaries' interest to Government, 475.
funeral, power of trustee to apply property of minor for, 479.

TRUSTS ACT, 1882—(*continued*).
Government Savings Bank, deposit in, 472.
securities, investment in, 471.
Hindu family, law relating to, not affected by Act, 461.
illegal purpose, bequest for, 493.
transfer for, 493.
immoral, trust must not be for —— purposes, 465.
immoveable property, trust for, 466.
impartial, trustee to be, 470.
incapable to act, appointment of new trustee in place of trustee, 489.
indemnity from gainer by breach of trust, 476.
of trustees, 475.
information, trustee to give, 411.
injunction to restrain breach of trust, 485.
insolvent not proper trustee, 484. [trustee, 489.
trustee becoming —— ground for appointment of new
inspection of documents, 483.
instrument of trust, definition of, 465
right of trustees to custody of, 476.
interest, trustee when liable to pay, 473.
investment of trust-property, 471.
varying, 478.
involuntary losses, indemnity from, 475.
joining in breach of trust, liability of beneficiary for, 487.
receipt for conformity, liability of trustee for, 474.
lawful purpose, trust must be for, 465.
lease by trustees, 477.
leasehold property, investment on, 471.
legal adviser gaining advantage by fiduciary character, 493.
liability of beneficiary joining in breach of trust, 487.
trustee for breach of trust, 472.
generally, 468.
loan, by trustees to themselves, 482.
loss of time, trustee has no right to remuneration for, 482.
lots, sale of trust-property in, 478.
maintenance of minor, 479.
management of trust, application for opinion of Court as to, 477.
marriage, power of trustee to apply property of minor for, 479.
married woman cannot alienate property settled to separate use, 483
not generally proper trustee, 484.
ministerial acts, delegation of, 481.
minor: advancement, education, and maintenance of, 479.
when a proper person to be trustee, 484.
trust may be created by, 467.
mix, trustee may not —— trust-property with his own, 487.
money, following trust-property wrongfully converted into, 486.
mortgage, investment on, 471.
of land pledged to Government, investment on, 472.
moveable property, trust for, 466.
necessary delegation of trust, 481.
new trustees, appointment of, 489.
not liable for predecessor's default, 474.
powers of, 490.
rules for selection of, 490.
vesting trust-property in, 490.
non-liability of trustee paying without notice of transfer by beneficiary, 475.
notes, following trust-property converted into, 486.
notice, definition of, 465.

TRUSTS ACT, 1882—(*continued*).

notice of transfer, non-liability of trustee paying without, 475.
saving of rights of purchaser without, 486.
number of trustees, right of beneficiary to proper, 484
obligations in nature of trust, 491.
Official Trustee, remuneration of, 482.
when he may be new trustee, 489.
opinion of Court, application for, 477.
overpayment, right of trustee to be recouped for, 476
partner, employment of trust-property in business by, 487.
gaining advantage by fiduciary character, 493.
perishable property, conversion of, 470.
personal liability of beneficiary to reimburse trustee, 476.
personal security, investment on, 482.
petition for advice of Court, 477.
appointment of new trustee, 489.
discharge, 488.
power, exercise of, after death or disclaimer, 480.
principal, application of, towards expenses of minor, 479.
prizes of war, trusts of, not subject to Act, 464.
profit, trustee may not —— from office, 482.
profits, beneficiary has right to, 483.
property acquired with notice of existing contract, trust of, 495.
proxy, delegation of ministerial act to, 481.
public policy, trust must not be contrary to, 465.
purchase by person contracting to buy property to be held on trust, 495.
trustee of trust-property, remedy in case of, 485.
of beneficiaries' interest by trustee, 482.
trustee for —— or sale may not buy trust-property, 482.
purchaser in good faith, saving of rights of, 486.
purpose of trust, must be declared, 466.
qualified owner, trust of, advantage gained by, 494.
rate of interest, 473.
ratification of sale of trust-property to trustee, 486.
receipt, trustee joining in, for conformity, 474.
of trustees, 479.
refusing to act, appointment of new trustee in place of trustee, 489.
registered, definition of, 465.
reimbursement of trustees, 476.
religious trusts not subject to Act, 464.
worship, power of trustees to apply property of minor for expenses of, 479.
remuneration of trustees, 482.
renounce, trustee cannot, after acceptance, 481.
rents, beneficiary has right to, 483.
representative, following trust-property into hands of, 486.
re-sell, power of trustee to, 478.
revocation of trust, 490.
rules for selection of new trustee, 490.
sale by trustees directed to sell within specified time, 472.
powers of trustees for, 478.
trustee for, may not buy trust-property, 482.
securities, what are proper for investment, 471.
separate use, married woman cannot alienate property settled to her ——, 483-4.
service of petition for advice of Court, 477.
set-off not allowed in respect of breach of trust, 474.
settlement of accounts, 477.

TRUSTS ACT, 1882—(*continued*).
several liability of co-trustees, 475.
shares, investment on, 471.
skill, trustee has no right to remuneration for, 482.
special conditions, power of trustee to make, 478.
specific execution of trust, right of beneficiary to, 483.
specified time, sale by trustee directed to sell within, 472.
stock, investment on, 471.
subject of trust, 467.
suit by beneficiary for execution of trust, 484.
to protect trust-property, 469.
survival of trust, 490.
suspension of trustee's powers by decree, 480.
state of trust-property, trustee to inform himself of, 469.
time for selling trust-property, 478
giving —— for payment of debts, 480.
title to trust-property, trustee to protect, 469.
trustee not to set up adverse —— to trust-property, 469.
title-deeds, right of trustee to custody of, 476.
transfer for illegal purpose, 492
non-liability of trustee paying without notice of, 475.
of beneficial interest, 484.
possession of trust-property, right of beneficiary to, 483.
trust-property wrongfully purchased, 485.
pursuant to rescindable contract, 493.
to one for consideration paid by another, 492.
transferree from beneficiary, rights and liabilities of, 488.
trouble, trustee has no right to reimbursement for, 482.
trust, beneficiary joining in breach of trust, 487.
definition of, 464.
delegation of, 481.
disclaimer of, 467.
extinction of, 490.
for payment of debts, 468.
impossibility of performance of, 490.
incapable of execution, 492.
liability for breach of, 472.
obligations in nature of, 491.
on transfer to one for consideration paid by another, 492.
revocation of, 491.
survival of, 490.
trust-property, definition of, 465.
following, 486.
investment of, 471.
must be described on declaration of trust, 466.
trustee may not profit from, 482.
not to set up adverse title to, 492.
to inform himself of state of, 469.
protect title to, 469.
vesting in new trustees, 490.
trustees, accounts by, 471.
acquisition of property wrongfully converted by, 487.
adverse title to trust-property may not be set up by, 469.
application by, for advice or opinion of Court, 477.
appointment of new, 489.
auction, may sell by, 478.
breach of trust by, 472.
buy in, power of, to, 478.
cannot act singly, 481.

TRUSTS ACT, 1882—(*continued*).
trustees, care required from, 469.
charge by, for services not allowed, 482.
conditions of sale, —— may require special, 478.
contract, may sell by, 478.
contribution between, 475.
conversion of perishable property by, 470.
conveyance by, 478.
definition of, 465.
delegation of trust by, 481.
disabilities of, 481.
discharge of, 488.
discretionary power of, not generally controlled, 471.
when Court may control, 481.
duty of, to inform themselves of state of trust-property, 469.
where trust incapable of execution, 492.
following trust-property converted by, 486.
for purchase may not buy, 482.
gaining advantage by fiduciary character, 493.
general powers of, 477.
impartial, to be, 470.
indemnity of, 475.
from gainer by breach of trust, 476.
injunction to restrain breach of trust by, 485.
interest when payable by, 473.
investment by, 471.
joining in receipt for conformity, 474.
liability of, for breach of trust, 472.
where beneficial interest forfeited to Govt., 475.
loan by, to themselves, 482.
lots, may sell in, 478.
mixing trust-property with their own, 487.
not liable for predecessor's default, 474.
powers of, as to minor's property, 479.
sale, 478.
profit by trust, may not, 482.
proper number of, 474.
protection of title to trust property, 469.
purchase by, of beneficiaries' interest, 482.
recouping —— for overpayment, 476.
receipts of, 479.
reimbursement of, 476.
remuneration of, 482.
renunciation of trust after acceptance by, not allowed, 488.
re-sale by, 478.
rules for selection of new, 490.
set-off in respect of breach of trust not allowed to, 474.
several liability of, 475.
special conditions, —— may fix, 478.
suspension of powers of —— by decree, 480.
title-deeds, custody of, by, 476.
vacation of office by, 488.
varying investments, powers of —— as to, 478.
waste, prevention of, by, 471.
when liable for co-trustee's default, 474.
who are proper persons to be new, 484.
who may be, 467.
wrongful purchase by ——, remedy for, 485.
undue influence, trust of property acquired by, 494.

TRUSTS ACT, 1882—(*continued*).
unexhausted interest, duty of trustees as to, 492.
unlawful trusts, 465.
vacating office of trustee, 488.
varying investments, 478.
vesting trust-property in new trustees, 490.
waste, trustees to prevent, 471.
wasting property, trustees to convert, 470.
wuqf, law of, not affected by Act, 464.
writing, appointment of new trustees to be in, 489.
consent of beneficiary to change of investment to be in, 479.
to investment to be in, 472.
when necessary to declaration of trust, 466.
wrongful purchase by trustee, remedy for, 485.

TRUST-PROPERTY,
following into hands of volunteer, 291.
liability of trustee for employing —— in trade, 314.
mixing it with his own money, 277, 318.
non-investment, 314.
payment of —— into Court, 336.
to *c. q. t.*, without notice of transfer, 208.
wrong person, 177.
under power-of-attorney, 207.
See PAYMENT.
purchase of —— from *c. q. t.* by trustee, 281.
trustee cannot set up adverse title to, 155.
may not take lease of, 260.
wrongfully converted, acquisition of —— by trustee, 313.
See TRUSTS, ACT, 1882.

TRUST AND POWER, mixture of, 18.

TRUSTS,
among Hindus, 8—14.
kinds of, 18.
origin of, in England, 1.

TRUSTEE AND TRUSTEES,
acceptance of trust by, 120.
See ACCEPTANCE OF TRUST.
acquiring absolute interest in trust-property when considered constructive trustee, 108.
agent of, may not purchase trust-estate, 260.
when liable to account 109.
also executor, acceptance by taking probate, 121.
appointment of, *see* APPOINTMENT OF NEW TRUSTEES; NEW TRUSTEES.
bound to be impartial, 152.
cannot benefit by trust, 107.
renounce after acceptance, 234.
c. q. t. entitled to proper number of, 284.
compellable to execute trust, 271.
compounding debts, liability of, 252.
constructive, *see* CONSTRUCTIVE TRUSTEE.
covenants entered into by, 224.
definition of, 18.
in Trusts Act, 465.
disabilities of, *see* DELEGATION OF TRUST; DISCRETIONARY TRUST; PROFIT; PURCHASE; REMUNERATION OF TRUSTEE; SALE.

TRUSTEE AND TRUSTEES—(*continued*).
discharge of, *see* DISCHARGE.
disclaimer by, 132.
duties of, *see* DUTIES OF TRUSTEE
employing trust-funds in trade, liability of, 251, 314.
for sale cannot purchase, 256.
powers of, under Trustee Act, 444.
gift to, 133, 252.
legal adviser when a constructive, 109.
liability of, for breach of trust, *see* BREACH OF TRUST; INJUNCTION; INVESTMENT.
may not profit from office, 250.
See PROFIT.
notice to, of assignment of equitable interest, 56.
number of, 328.
of charity, *see* CHARITABLE TRUSTS, 362.
idol, removal of, 379.
religious establishments, *see* RELIGIOUS TRUSTS, 401.
wuqf property, removal of, 387.
paid to retire, 330.
petition for advice of Court, *see* PETITION.
purchase of trust-property by, *see* BREACH OF TRUST; PURCHASE.
receipts of, *see* RECEIPT.
reconveyance by, 289.
reimbursement of, *see* REIMBURSEMENT.
release to, 177, 192, 222.
remuneration of, *see* REMUNERATION OF TRUSTEES.
retiring from trust for consideration, 255.
renewing lease, remedy, 109.
suit for appointment of, 284.
to compel performance of act of duty by, 287.
restrain breach of trust by, 206, 287.
See SUITS.
trust not allowed to fail for want of, 282.
vacating office by, 326.
when allowed to bid for trust-estate, 264.
bound by recitals in deed, 122.
necessary party to suit, 341.
who may be, 124, 467.
See TRUSTS ACT, 1882.

TRUSTEE ACT, 1866, p. 415.
absence of trustee, Court may make order in, 441.
cause, order may be made in, 439.
charities, power of High Court under Act as to, 440.
companies to obey order vesting stock, 430.
conclusive evidence, when order of Court is, 439.
'contingent right,' definition of, 416.
discharge of, where decree for sale of immoveable property for payment of debts, 431.
of lunatic, conveyance of, by High Court, 419.
trustee, 422.
minor trustee and mortgagee, releasing property from, 420.
trustee jointly entitled with others out of jurisdiction, order as to, 422.
unborn trustee, vesting order as to, 423.
continuing liability of old trustee, 437.
'convey' and 'conveyance,' definitions of, 416.
convey, power of High Court to appoint person to, 425.

TRUSTEE ACT, 1866—(*continued*).
conveyance of contingent right of lunatic, 419.
estate of trustee out of jurisdiction, 421.
immoveable property held jointly with person out of jurisdiction, 421.
where trustee out of jurisdiction, 422.
Court, appointment of new trustee by, 434.
costs of petitions, 441.
decree, orders to have effect of, 443.
'devisee,' definition of, 417.
dividends in name of minor trustee, order for transfer of, 431.
enquiry as to person of unsound mind, 442.
extent of Act, 418.
'heir,' definition of, 417.
'High Court,' 'held,' and 'holding,' definitions of, 416.
'immoveable property,' definition of, 415.
indemnity to persons obeying orders, 443.
jurisdiction of High Court, 418.
'lunatic,' definition of, 417.
lunatic trustee and mortgagee, conveyance of estate of, 418.
minor, payment of money of, into Court, 440.
trustee and mortgagee, conveyance of estate of, 420.
mortgage,' definition of, 417.
mortgagee, conveyance of estate of lunatic, 418.
new trustees, appointment of, by Court, 434.
vesting immoveable property in, 436.
right to call for transfer of stock in, 437.
order may be made in absence of trustee, 441.
cause, 439.
payment into Court of money of minor, 440.
'person' and 'person of unsound mind,' definitions of, 417.
person of unsound mind, payment of money of, into Court, 440.
petition, applications to Court to be by, 438.
what may be done on, 439.
who may present, 437.
right to call for transfer of stock vesting in new trustees, 437.
stamp-duty payable on orders, 441.
'stock,' definition of, 415.
stock, directions as to transfer of, 433.
vesting order as to, 425.
companies to obey, 430.
effect of, 428.
in name of deceased trustee, 427.
minor trustee, 431.
when trustee beyond jurisdiction, 426.
trustee refuses to receive and pay dividends, 427.
suit may be directed, 442.
'transfer,' definition of, 416.
of dividends in name of minor trustee, order as to, 431.
lunatic trustee and mortgagee, 419.
power of High Court to give directions as to, 433.
stock or Govt. securities of deceased person, 420.
'trust' and 'trustee,' definitions of, 416.
trustee, conveyance of estate of lunatic, 418.
trustees, Court to declare who are, of immoveable property where suit, 432
unsound mind, conveyance of estate of person of, 418.
enquiry as to person of, 442.
vesting immoveable property in new trustee, 436.

TRUSTEE ACT, 1866—(*continued*).
vesting order as to contingent right of unborn trustee, 423.
stock, 425.
effect of, 428.
standing in name of deceased person, 428.
minor trustee, 431.
when trustee beyond jurisdiction, 426.
when trustee refuses to receive and pay dividends, or to transfer, 427.
thing in action, 429.
executor neglecting to transfer stock after, 430.
in lieu of conveyance, 431. [124.
on refusal or neglect of trustee to convey or release,
right to transfer of person neglecting, 429.
when mortgagee dead, 424.
trustee dies without heir, 423.
uncertain whether last trustee living or dead, 423.
which of several trustees was survivor, 422.
vesting right to call for transfer of stock in new trustee, 437.
TRUSTEES' AND MORTGAGEES' POWERS ACT, 443.
administrator, liability of, as to rents and covenants, etc., 458.
petition for advice of High Court by, 459.
advice of High Court, petition for, 459.
agent of mortgagor receiver deemed to be, 448.
application of money received by receiver, 449.
purchase-money, 446.
purchaser when not bound to see to, 453.
appointment of new trustees, 454, 456.
receiver, 447.
apportionment of conditions of re-entry, 450.
assets, distribution of, 459.
assignment to self and others, 453.
auction, trustees may sell by, 444.
charge, owner of, may call for title-deeds and conveyance, 447.
compound, powers of executor to, 457.
conditions of re-entry, apportionment of, 450.
sale, 444.
contract, trustees may sell by, 444.
conveyance by trustees exercising power of sale, 445.
owner of charge may call for, 447.
to purchaser, 447.
descent how traced, 453.
discharge of person paying purchase-money, 446.
trustees' receipts to be, 456.
distribution of assets of testator or intestate, 459.
execution of powers, mode of, 451.
executor, liability of, as to rents and covenants, etc., 458.
may compound, 457.
petition for advice of High Court by, 459.
power of, to raise money, 452.
'High Court,' definition of, 444.
'immoveable property,' definition of, 444.
indemnity-clauses when presumed, 456.
insurance by receiver, 448.
investment of moneys arising from sale, 445.
trust-funds, 453.
legatee in trust, power to raise money by sale, 451.
license to alien, effect of restriction on, 449.
lots, trustee may sell in, 444.

TRUSTEES' AND MORTGAGEES' POWERS ACT—(*continued*).
maintenance, power of trustees as to, 454.
minors, maintenance of, 454.
mode of execution of powers, 451.
'mortgage,' 'mortgagor,' 'mortgagee,' definitions of, 444.
mortgages, powers incident to, 445.
new trustees, appointment of, 454.
notice of sale, 446.
partial licenses, restricted effect of, 450.
payment under power of attorney, 457.
petition for advice of High Court, 459.
power of attorney, payment under, 457.
powers, execution of, by tenant-for-life, 460.
mode of execution of, 451.
of receiver, 448.
purchaser, not bound to enquire as to, 452.
purchaser, not bound to see to application of purchase-money, 453.
nor to enquire as to powers, 452.
receipt of trustee for purchase-money a discharge, 446.
receiver, application of purchase-money received by, 449.
appointment of, 447.
insurance by, 448.
is agent for mortgagor, 448.
powers of, 448.
removal of, 448.
remuneration of, 448.
reimbursement, clause as to, when presumed, 456.
release of part of land charged, not extinguishment, 450.
removal of receiver, 448.
remuneration of receiver, 448.
restriction on license to alien, effect of, 449.
securities for investment, 453.
tenant-for-life, execution of powers by, 460.
title-deeds, owner of charge may call for, 447.

TURN OF WORSHIP.
right to, 377.
sale of, 376.
suit for, 377.

UNCERTAINTY, gift for religious or charitable purposes void for, 356.

UNDUE INFLUENCE,
setting aside settlement on ground of, 121.
voluntary settlement obtained by, 59.
cuaf obtained by, 384.
See TRUSTS ACT, 1882.

UNFITNESS, what is, 329.

UNLAWFUL TRUSTS, 19, 32, 465.
See TRUSTS ACT, 1882.

USES, 4.

VACATING OFFICE of trustee, 326.
See TRUSTS ACT, 1882.

VAGUE TRUSTS, 85

VALUATION,
duty of trustee for purchase to obtain, 117.
for sale, 169.

VALUE, following trust-property into hands of purchaser for, 292.

VARYING INVESTMENTS, power of trustee as to, 162, 225.
See TRUSTS ACT, 1882.

VENDEE, when trustee for vendor, 83.

VESTING
trust-estate in new trustee, 335, 436, 462.
trustees of charity, 363, 366.
under Act XXI of 1860, p. 392.
See TRUSTEE ACT, 1866; TRUSTS ACT, 1882.

VISITORS OF CHARITY, 361.

VOLUNTARY GIFTS,
to persons in fiduciary capacity, 111.
setting aside, 111.

VOLUNTARY SETTLEMENT, 53.
for purpose of defrauding creditor, 59.
how far void as against creditors, 64.
on whom binding, 72.
setting aside, 59.
when settlor may defeat, 67.

VOLUNTARY TRUST, what is a valid, 57.

VOLUNTEER, following trust-property into hands of, 291.

VOUCHERS, right of *c. q. t.* to copies of, 158.

WARD, setting aside gift to guardian by, 113.

WASTE,
by Hindu widow, 145.
trustee ground for appointment of receiver, 340.
duty of trustee to prevent, 142.
See TRUSTS ACT, 1882.

WIFE, no resulting trust on purchase in name of, 90.

WILFUL DEFAULT,
must be pleaded, 187.
trustee when chargeable with, 182.

WILL,
executory trust in, 21.
implied trust in, 77.
trust in, for payment of debts, 76.
resulting trust in, 83.

WINDING-UP TRUST, 219.
time for, 121.

WORSHIP, right to erect places of, 380.

WRITING, when necessary to creation of trust, 51.
See TRUSTS ACT, 1882.

WRITTEN AUTHORITY, payment of trust-fund on, 179.

WRITTEN STATEMENT, disclaimer by, 133.

WUQF,
alienation of —— property, 385.
subject to trust, 386.
altamgha,' use of word, 383.
appointment of mutawalli, 388.
appropriation of property for purposes of, 381.
evidence of, 382.
breach of trust, 387.
creation of, 381.
endowment subject to mortgage, 384.
evidence of appropriation, 382.
female may be mutawalli, 388.
'inam,' use of the word, 383.
injunction to restrain obstruction to worship, 390.
lease of —— property, 386.
mutawalli, appointment of, 388.
mortgage by local custom, 386.
endowment subject to, 384.
nominal endowment, 386.
objects of, 381.
office of trustee of, 388.
purchase from trustee of, 387.
removal of trustee, 337.
requisites to valid creation of, 382.
revocation of, 385.
succession to office, 388.
suits respecting, 389.
transfer of trust, 386.
undue influence, grant obtained by, void, 384
See TRUSTS ACT, 1882.

YEAR for realizing assets, 173, 221.